Supreme Court, U. S.
FILED
JUN 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1843

JAMES E. HOLSHOUSER, JR., et al.,

Petitioners

v.

THOMAS BOLDING, et al.,

Respondents.

Petition For Writ of Certiorari To The United States Court of Appeals For the Fourth Circuit

RUFUS L. EDMISTEN
Attorney General of North Carolina

JACOB L. SAFRON
Special Deputy Attorney General

JAMES PEELER SMITH
Assistant Attorney General

Post Office Box 629
Raleigh, North Carolina 27602

Counsel for the Petitioners

DI CESARE - Printing — 331-8101 — Washington, D.C. 20006

INDEX

Page

OPINION BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 4

STATEMENT OF THE CASE AND FACTS 4

REASONS FOR GRANTING THE WRIT: 9

I. The Effect Of The Decision Of The Fourth Circuit Court Of Appeals Is That Virtually No Pleading Filed By Or On Behalf Of A Prisoner May Be Dismissed Under Rule 12(b) Of The Federal Rules Of Civil Procedure, Regardless Of However Vague, Conclusory Or Lacking In Factual Allegations The Pleading May Be. This Holding Is Contrary To The Decisions Of This Court In *Procunier v. Navarette*, ____ U.S. ____ (February 22, 1978) And *Estelle v. Gamble*, 429 U.S. 97 (1976). The Holding Further Is Counter To Judicial Efficiency And Economy By Requiring That The Time Of The Courts And The Money Of Taxpayers Be Expended In Responding To Pleadings Which Have No Factual Allegations 9

II. The Holding Of The Fourth Circuit Abrogates In Prisoner Litigation The Requirement That A Plaintiff Must Demonstrate His Standing To Sue And Assert A Real Case Or Controversy Between Himself And The Defendant 16

III. The Action Of The Court Of Appeals Reversing The District Court Permits A Purported Class Action Suit To Circumvent The Rules Of Venue By Naming A Nominal Defendant In A Remote Location, Although The Real Defendant Resides Or The Real Cause Of Action Arose In Another District 20

IV. The Action Of The Fourth Circuit Violates The Holding Of This Court In *Rizzo v. Goode*, 423 U.S. 362 (1976) And *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) 23

CONCLUSION 25

APPENDIX

Page

Opinion Of The United States Court Of Appeals For The Fourth Circuit, Filed May 4, 1978 ..... A-1

Memorandum And Order Of The United States District Court For The Western District Of North Carolina, Asheville Division, Filed On August 16, 1976 ..... A-22

Plaintiffs' Complaint Filed In The United States District Court For The Western District Of North Carolina, Asheville Division, On May 10, 1976 ..... A-29

List Of Individual Cases Filed By The Plaintiffs A-44

Certificate of Service

TABLE OF CITATIONS

Page

Cases

Adickes v. Kress & Co., 398 U.S. 144 (1970) 15

Baker v. Carr, 369 U.S. 186 (1962) 16

Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969) 27

Bounds v. Smith, 430 U.S. 817 (1977) 14

Conley v. Gibson, 355 U.S. 41 (1957) 10, 12, 14

Cooper v. Riddle, 540 F.2d 731 (4th Cir. 1976) 24

Cruz v. Beto, 405 U.S. 319 (1972) 10, 14, 25

East Texas Motor Freight System, Inc. v. Rodriquez, ___ U.S. ___ (May 31, 1977) 17

Estelle v. Gamble, 429 U.S. 97 (1976) 10, 14

Flast v. Cohen, 392 U.S. 83 (1968) 16, 19

Haines v. Kerner, 404 U.S. 519 (1972) 10, 14

Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119 (1977) 11, 23, 24

Laird v. Tatum, 408 U.S. 1 (1972) 19

McGowan v. Maryland, 366 U.S. 420 (1961) 16

Massachusetts v. Mellon, 262 U.S. 447 (1923) 18

O'Shea v. Littleton, 414 U.S. 488 (1974) 17, 18

Procunier v. Martinez, 416 U.S. 396 (1974) 25, 27

Procunier v. Navarette, ___ U.S. ___ (February 22, 1978) 10, 14

Rizzo v. Goode, 423 U.S. 362 (1976) 3, 8, 11, 17, 23, 24

Schlesinger v. Reservists To Stop The War, 418 U.S. 208 (1974) 16, 17, 18, 19

Sierra Club v. Morton, 405 U.S. 727 (1972) 20

United Public Workers v. Mitchell, 330 U.S. 75 (1947) ...20

United States v. Raines, 362 U.S. 17 (1960) 16

Woodhous v. Commonwealth Of Virginia, 487 F.2d 889 (4th Cir. 1973) 27

Constitutional Provisions:

First Amendment, United States Constitution 4

Sixth Amendment, United States Constitution.....4

Eighth Amendment, United States Constitution 4

Fourteenth Amendment, United States Constitution.....4

Statutes Involved:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1391 ..... 3, 21

42 U.S.C. § 1983 ..... 5, 7, 10, 21, 23, 24, 26, 27

N.C.G.S. Ch. 143B, Article 6, Executive Organization Act 21

N.C.G.S. Ch. 148, State Prison System 21

Miscellaneous:

Federal Rules of Appellate Procedure, Rule 35 9

Federal Rules of Civil Procedure, Rule 8 ..... 12, 16

Federal Rules of Civil Procedure, Rule 12 11

Federal Rules of Civil Procedure, Rule 56 15

Wright, *Law of Federal Courts* (3d ed. 1976) 12, 13

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No.

JAMES E. HOLSHOUSER, JR., et al.,

Petitioners,

v.

THOMAS BOLDING, et al.,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, James E. Holshouser, Jr., formerly the Governor of North Carolina; David L. Jones, formerly the Secretary of the North Carolina Department of Correction; Ralph D. Edwards, Director of the North Carolina Division of Prisons; Jack Scism, formerly the Chairman of the North Carolina Parole Commission; J. Richard Smith, formerly the

Superintendent of the Craggy Subsidiary Unit of the North Carolina Division of Prisons; E. C. Watkins, Superintendent of the Stanly County Subsidiary Unit of the North Carolina Division of Prisons; L. V. Stephenson, Superintendent of the Caledonia Institution of the North Carolina Division of Prisons; Sam P. Garrison, Warden of North Carolina Central Prison, of the North Carolina Division of Prisons; and Fred Briggs, Chairman of the Central Classification Committee of the North Carolina Division of Prisons, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fourth Circuit filed April 26, 1978, in the case of *Bolding v. Holshouser*.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit filed May 4, 1978, is not yet reported and is printed in the Appendix to this Petition [A. pp.A-15 through A-24].

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I. WHETHER A WHOLLY CONCLUSORY COMPLAINT, TOTALLY LACKING IN FACTUAL ALLEGATIONS, STATES A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

II. WHETHER A WHOLLY CONCLUSORY COMPLAINT, TOTALLY LACKING IN FACTUAL ALLEGATIONS, IS A SUFFICIENT BASIS UPON WHICH A FEDERAL COURT SHOULD UNDERTAKE A COMPLETE REVIEW OF THE NORTH CAROLINA PRISON SYSTEM TO DETERMINE WHETHER ANY PRISONER HAS BEEN SUBJECTED TO THE DEPRIVATION OF FEDERAL CONSTITUTIONAL RIGHTS TO THE EXTENT THAT THE FEDERAL COURT SHOULD UNDERTAKE THE SUPERVISION OF THE ADMINISTRATION OF THE NORTH CAROLINA PRISON SYSTEM.

III. WHETHER A WHOLLY CONCLUSORY COMPLAINT, TOTALLY LACKING IN FACTUAL ALLEGATIONS, IS SUFFICIENTLY PLEADED TO DETERMINE WHETHER ANY OF THE NAMED PLAINTIFFS HAS DEMONSTRATED A PERSONAL STAKE IN THE OUTCOME SUCH AS TO CONFER STANDING UPON THEM.

IV. WHETHER THE RELIEF SOUGHT VIOLATES THE PRINCIPLES OF FEDERALISM AND JUDICIAL RESTRAINT ENUNCIATED IN *RIZZO v. GOODE*, 423 U.S. 362 (1976).

V. WHETHER PLAINTIFFS HAVE PLEADED A JUSTICIABLE CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III OF THE UNITED STATES CONSTITUTION.

VI. WHETHER THE VENUE PROVISION CODIFIED AT 28 U.S.C. § 1391 MAY BE CIRCUMVENTED BY NAMING A NOMINAL DEFENDANT WHEN ALL OTHER DEFENDANTS RESIDE OUTSIDE OF THE DISTRICT AND THE CAUSE OF ACTION, AROSE, IF AT ALL, IN ANOTHER DISTRICT WITHIN THE STATE.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the First, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE AND FACTS

On May 10, 1976, the Plaintiffs, 29 state court prisoners housed in 13 of the 84 facilities across the State of North Carolina which comprise the Division of Prisons of the North Carolina Department of Correction (of whom only 8 were housed in 4 facilities within the jurisdiction of the United States District Court for the Western District of North Carolina)[1] brought suit

---

[1]**Western District** — 8 inmates

Craggy Correctional Institution, Asheville ..... Raymond Creason, Gerald R. Price, Gonzales Jones, and Norman Anthony	4 inmates
Iredell County Subsidiary, Statesville ..... Wilbert Clemmons	1 inmate
Lincoln County Subsidiary, Lincolnton ..... Erwin Zelms	1 inmate
Union County Subsidiary, Monroe ..... Jodie V. Austin and John H. Stacks	2 inmates
Middle District — 6 inmates	
Rowan County Subsidiary, Salisbury	1 inmate
Stanly County Subsidiary, Albemarle	1 inmate
Guilford County Subsidiary No. 1, High Point.....	1 inmate
Randolph County Subsidiary, Asheboro	3 inmates
Eastern District — 15 inmates	
Correctional Center for Women, Raleigh.....	3 inmates
Odom Correctional Institution, Jackson.....	2 inmates
Central Prison, Raleigh	5 inmates
Triangle Correctional Center, Raleigh	1 inmate
Caledonia Correctional Institution, Tillery.....	4 inmates

through counsel on behalf of themselves, individually, and on behalf of all others similarly situated, based upon the Civil Rights Act of 1871, 42 U.S.C. § 1983, seeking declaratory and injunctive relief. [A. pp.] In the Complaint prepared by Russell P. Brannon, Esq., of the firm of Van Winkle, Buck, Wall, Starnes, Hyde and Davis, P.A., and Allen H. Wellons, Esq., both of the Asheville, North Carolina, Bar, the Plaintiffs alleged that the following conditions exist in the North Carolina Department of Correction: severe overcrowding, inadequate administrative hearing procedures, improper classification of inmates, inadequate and restricted programs for education, recreation, and work release, improper treatment of prisoners in solitary, and improper interference with the transmittal of mail. Based upon these alleged conditions the Plaintiffs sought from the United States District Court for the Western District of North Carolina the following injunctive relief:

> (a) Enjoining the Defendants from accepting any new prisoners into the North Carolina Prison System until inmate population is reduced to the point that minimum Constitutional standards are met;
>
> (b) Requiring the North Carolina Department of Correction and Board of Paroles to release or parole sufficient numbers of prisoners to reduce the inmate population to a level where minimum Constitutional standards are met;
>
> (c) Enjoining the construction of further prison facilities until constitutionally acceptable programs for education, recreation, work release, etc., are funded and developed;
>
> (d) Requiring the Defendants to make available to the Plaintiffs and others similarly situated basic items and

facilities necessary for personal hygiene, adequate medical care, and adequate sanitary food service conditions, regardless of whether the inmate is in solitary or regular confinement;

(e) Requiring the Defendants to develop and implement a classification plan which will insure the protection of Plaintiffs and all others similarly situated from physical violence and other violations of their rights;

(f) Enjoining the Defendants from censorship of and other interference with inmate mail, except to search for contraband and then only in the presence of the inmate; and requiring the Defendants to expeditiously deliver mail addressed to or by prison inmates in accordance with the United States Postal regulations.

(g) Requiring the Defendants to accord to the Plaintiffs and all others similarly situated fundamental due process rights, including notice and the right to a meaningful hearing, with respect to all significant actions affecting them.

The Defendants moved to dismiss the action for failure to state a claim upon which the relief sought can be granted contending that the Complaint is so vague and general that it must be considered conclusory in nature with inadequate allegations in support thereof. The Defendants also contended that the District Court lacked subject matter jurisdiction and was not the proper venue for the action.

A hearing on the Defendants' Motion was conducted by the District Court at the July 1976 Term in Asheville. Following the hearing, the Court took the matter under advisement and on

August 16, 1976, filed its Memorandum and Order dismissing the Complaint [A. pp. A-27 through A-28] for failure to state a claim upon which the relief sought could be granted by the District Court and for seeking relief "beyond the powers of the federal judiciary and violative of the principles of federalism, comity and equity." [A. p. A-27] In dismissing this Complaint, the Court specifically pointed out that

> . . . [t]his is not to say that these Plaintiffs do not have an available avenue for redress, for this decision does not prejudice their rights to plead their cases individually[2] upon the peculiar facts of each case. Section 1983 of 42 United States Code has staunchly protected the civil and constitutional rights of the prison population, as well as the total citizenry of this country. This statute protects all citizens from those who abuse authority purportedly conferred by state law, and provides a right and a remedy in the federal courts. The Plaintiffs, who seek such broad relief in this Court today, may again come to this forum pleading the individual facts which support their respective cases. If the individual facts are meritorious and support the legal conclusions pleaded today, then this Court is bound by its office to afford proper relief . . . Nevertheless, facts must be pleaded and proven to support these legal conclusions before relief is available, and certainly this relief cannot extend to a total usurpation of a state agency. Therefore, the Court finds that the dismissal of the Plaintiffs' Complaint for failure to state a cause of action is in order. This dismissal is without prejudice to the

---

[2]A listing of other actions brought by the named Plaintiffs is included at pp. A-44 through A-48 of the Appendix.

> Plaintiffs, for the courts remain available to hear future actions they may file which are properly pleaded and which are supported by factual allegations . . . . [A. pp. A-27, A-28]

On September 19, 1976, following the Court's Order dismissing the Complaint, Plaintiffs gave notice of appeal to the Fourth Circuit Court of Appeals. This matter came on for argument December 5, 1977, before Chief Judge Haynsworth, Senior Judge Bryan and Judge Winter of the Fourth Circuit. In a 2-1 decision filed May 4, 1978, the panel reversed the District Court and remanded the case to the District Court for further consideration. With respect to the following matters, the majority of the panel found that Plaintiffs had sufficiently pleaded a cause of action: (1) overcrowding; (2) interference with mail; (3) failure of the prison system to "meet minimum standards of the United States Public Health Service"; (4) certain other unconstitutional conditions of confinement; and (5) failure of the prison system "to provide adequate sanitary food service facilities." In regard to Plaintiffs' claim of denial of due process, the Court of Appeals agreed with the District Court that this matter was insufficiently pleaded to state a claim for relief; however, the majority felt dismissal should be with leave to amend the pleadings of Plaintiffs were able to state a cause of action.

Senior Judge Bryan vigorously dissented. He declared that the "very entertainment of the instant complaint" is offensive to the principle of federalism as enunciated in *Rizzo v. Goode*, 423 U.S. 362 (1976). He felt that a federal court takeover of the North Carolina prison system was not relief which a District Court was authorized to grant and that the District Court was correct in so holding. Judge Bryan further declared that the relaxed standards applied in prisoner pro se petitions were not applicable to the pleading in this case as "[t]he complaint was drawn and

counseled by reputable attorneys." [A. p. A-20] As "[p]laintiffs were left free to bring separate appropriate actions for themselves and others suffering deprivations in the same prison [unit]," Judge Bryan felt that the District Court was correct in dismissing the Complaint because the individual plaintiffs were not prejudiced thereby. [A. p.A-21]

Upon circulation of the opinions in the case through the full Court, Judge Hall, not a member of the panel, *sua sponte* moved for rehearing and rehearing in banc. Because under Rule 35 of the Federal Rules of Appellate Procedure, only those Circuit Judges who are in "regular active service" may order a rehearing in banc, and Judge Hall's Motion failed 3 to 3. Ironically, as revealed in the Opinion, had all the Judges of the Fourth Circuit been permitted to vote, the Opinion of the District Court would have been affirmed 5 to 3 as Judges Russell, Widener and Hall announced their dissent for the reasons stated in Judge Bryan's desenting opinion. [A. p. A-12]. Senior Circuit Judge Field also placed himself "on record as being in complete accord with the views experssed by Judge Bryan. . ." [A. p. A-21] However, the provisions of Rule 35 prohibited the votes of Senior Judges Bryan and Field from counting, although Judge Bryan was on the original panel, and the Motion failed 3 to 3 instead of passing 5 to 3, reversing the panel and affirming the District Court.

REASONS FOR GRANTING THE WRIT

I. THE EFFECT OF THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS IS THAT VIRTUALLY NO PLEADING FILED BY OR ON BEHALF OF A PRISONER MAY BE DISMISSED UNDER RULE 12(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE, REGARDLESS OF HOWEVER VAGUE, CONCLUSORY OR LACKING IN FACTUAL ALLEGATIONS THE PLEADING MAY BE. THIS HOLDING IS CONTRARY TO THE DECI-

SIONS OF THIS COURT IN *PROCUNIER v. NAVARETTE*, ___ U.S. ___ (FEBRUARY 22, 1978) AND *ESTELLE v. GAMBLE*, 429 U.S. 97 (1976). THE HOLDING FURTHER IS COUNTER TO JUDICIAL EFFICIENCY AND ECONOMY BY REQUIRING THAT THE TIME OF THE COURTS AND THE MONEY OF TAXPAYERS BE EXPENDED IN RESPONDING TO PLEADINGS WHICH HAVE NO FACTUAL ALLEGATIONS.

In reliance on what it conceived to be the requirements of *Conley v. Gibson*, 355 U.S. 41, 46 (1957); *Cruz v. Beto*, 405 U.S. 319 (1972) and *Haines v. Kerner*, 404 U.S. 519 (1972), a panel of the United States Court of Appeals for the Fourth Circuit reversed the District Court's dismissal of a Complaint filed by twenty-nine inmates from prison units dispersed across the State of North Carolina. The District Court had ruled that the Complaint failed to state a claim upon which relief can be granted. The District Court found the Complaint to "have merely asserted legal conclusions with no factual allegations in support thereof." [A. p. A-25][3]

---

[3]The District Court made the following observation:

> The Plaintiffs failed to allege facts which would support a conclusion that the prisons are overcrowded; they fail to allege what inadequacies exist in hearing procedures; they fail to show in what way the classification of inmates is improper; they fail to enunciate the restrictions placed upon programs for education, recreation, and work release, and show in what way these programs are inadequate; and finally the Plaintiffs have failed to allege any acts of the Defendants which would support a finding that prisoners in solitary are improperly treated or that there is improper interference with their mail. *Instead, the Plaintiffs have boldly and baldly made conclusory statements insufficient to state a cause of action under 42 U.S.C.A. § 1983.* (Emphasis added.) [A. p. A-25]

The reversal of the District Court's Order eviscerates all standards by which the sufficiency of pleadings may be judged and essentially eradicates the possibility of dismissing under Rule 12(b) any prisoner civil rights action, whether pro se or drafted by counsel. The Opinion of the Fourth Circuit further requires the federal District Court to undertake minute scrunity of the North Carolina Prison system upon nothing more than a complaint which is comprised of only conclusory pleadings, devoid of any facts relating to actual circumstances, occurrences or events, and which seeks a federal court takeover of the North Carolina prison system in complete disregard of the principles just recently reaffirmed in *Rizzo v. Goode*, 423 U.S. 362 (1976), and *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977).

Senior Judge Bryan, referring to Plaintiffs' Petition as a "blunderbuss complaint," [A. p. A-20] declared that

> [t]he very entertainment of the instant complaint, in my view, offends a fundamental of federalism: it is a bald, bold and entire usurpation of an official State function. *Rizzo v. Goode*, 423 U.S. 362, 380 (1976). Argument to sustain the suit as one simply ill-pleaded ignores the integral and facial insufficiency in law of the complaint. Immediately its illegal concept is manifest in the compass of its allegations and prayers for their effectuation. [A. p. A-16]

Judge Bryan is undoubtedly correct in his assessment of the Complaint. What the Plaintiffs ultimately want is for the Federal Courts to assume the administration of the North Carolina prison system. Plaintiffs announce their fundamental opposition to the way they think the North Carolina Department of Correction is being operated. In their BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS, the Inmates bluntly declare:

> This is a class action challenging the totality of the conditions of confinement in the North Carolina prison system. It is the way the prison system is being administered by the Defendants, the policies the Defendants have taken and *not* taken which are the focus of this suit. In essence, it is the very existence of the North Carolina prison system which is being challenged as being inherently violative of the Eighth Amendment prohibition against cruel and unusual punishment. [Plaintiffs' emphasis.]

The essence of the Plaintiffs' Complaint is their charge that prisons in North Carolina are "overcrowded," but they have also thrown in other amorphous charges. [See A. pp. A-36 through A-40] Judge Winter acknowledges difficulty in setting forth concisely Plaintiffs' contentions and we can sympathize with his difficulty in "summarizing them yet preserving their essential fullness." [A. p. A-4] After reading the Complaint, Defendants were hardly in a better position to determine exactly what they had done wrong and to whom.

The majority Opinion has misapplied the standard of Rule 8(e)(1) of the Federal Rules of Civil Procedure that "no technical forms of pleading or motion are required," but rather "a pleading shall be simple, concise, and direct." In attempting to apply this Rule to these pleadings, the majority has forgotten that pleadings must still "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. at 47.

> . . . [P]leadings under the rule may properly be a generalized summary of the party's position, sufficient to advise the party for which incident he is being sued, sufficient to show what was decided for purposes of res judicata, and sufficient to indicate whether the case should be tried to the Court or to a jury. [Wright, *Law of Federal Courts* 319 § 68 (3d Ed. 1976)].

The Defendants strongly contend that the Plaintiffs' pleadings do not measure up even to the liberal standards of the Federal Rules. Professor Wright further points out in regard to *Conley v. Gibson:*

> The rules require the pleader to disclose adequate information as the basis of his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it. It is true that in *Conley v. Gibson* the Supreme Court referred to "simplified 'notice pleading,'" but in context it is plain that the Court's statement was one of aim rather than definition. Only two sentences before the phrase in question the Court had emphasized that the rules require the complaint to give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Thus the Court recognized that the rule does contemplate the statement of circumstances, occurrences, and events in support of the claim presented, even though it permits the circumstances to be stated with great generality. [Wright, supra at 323]

If every prisoner complaint were viewed with the unrestricted liberality applied by the majority in this case, virtually no prisoner complaint, whether pro se or lawyer drafted, could be dismissed. This of course is not what happens in reality.[4] Hundreds of prisoner complaints are dismissed each

---

[4]In fact, the Court of Appeals in the present case upheld the District Court's dismissal of the inmates' due process claims. [A. p. A-8] The majority noted that these "allegations are so general and so broad that they state conclusions of law rather than a short and plain statement showing that plaintiffs are entitled to relief." Defendants agree here with the majority's description of these contentions but find no greater specificity here than in those allegations which the majority found sufficiently pleaded.

year because it is apparent to the District Courts that the petitioners in those cases can show no set of facts which would entitle them to relief. Moreover, this Court has very recently on two occasions demonstrated that a prisoner petition can be dismissed on the pleadings. In *Estelle v. Gamble*, 429 U.S. 97 (1976) this Court held that the prisoner's own pleadings showed that he was not entitled to relief. And in *Procunier v. Navarette*, ___ U.S. ___ (February 22, 1978), this Court said that the complaint which charged that the Defendants negligently mishandled prisoner legal mail during the period from September 1, 1971, to December 11, 1972, was insufficient to overcome the prison employees qualified official immunity.

It is ironic, but inevitable, that if the action of the Fourth Circuit is sustained, plaintiffs will be encouraged to plead less specifically in order to get their respective feet in the courtroom door. Had Gamble or Navarette pleaded their cases more generally, under the yardstick applied in the case at bar their pleadings could not have been dismissed at an early stage of the proceedings. Thus the majority's criteria in judging this Complaint has the further effect of requiring the expenditure of time and money before obviously meritless cases can be terminated.

Furthermore, even in prisoner litigation this Court has never held that it is unnecessary to plead any facts. An examination of *Cruz v. Beto*, 405 U.S. 319 (1972) and *Haines v. Kerner*, 404 U.S. 519 (1972) reveal that the plaintiffs in those cases had in fact pleaded enough specific facts that they had stated, if proved, claims for relief. Cf. *Conley v. Gibson*, supra. Moreover, in *Bounds v. Smith*, 430 U.S. 817 (1977) Mr. Justice Marshall commented that though inmate complaints are construed liberally, nonetheless they are still required to "set forth facts giving rise to the cause of action."

The majority opinion in the instant case has turned the rules of pleading upside down and shifted the burden of proof to Defendants. If a plaintiff can get into court on such pleadings as the ones in question here, the burden will be on the defendant to disprove any possibility that some named plaintiff, or for that matter any prisoner in a purported class action suit, has suffered any constitutional wrong. The majority suggests somewhat blithely that the Defendants should proceed with discovery with an eye toward moving for partial summary judgment under Rule 56. However, summary judgment may be granted only if the movant can show the absence of any disputed issue of material fact. Cf. *Adickes v. Kress & Co.*, 398 U.S. 144, 159, 160 (1970). Thus Defendants must negate all possibility that they have unconstitutionally harmed any prisoner although they have not been confronted with even one factual allegation claiming harm. Defendants must become the Devil's Advocate, make Plaintiffs' case and then disprove it.

Judge Bryan recognizes the predicament in which the majority has placed the State in this case:

> We must be mindful that the State is entitled to some consideration. Should a State be subjected to a deliberate broadside attack upon one of its major functions and then its defense be limited to a motion for more definite statements, submission of interrogatories, request for admissions, severances of the claims or other defense procedures in the Rules? Entertainment of this action will invite generally complaints against a single prison to be framed as an action against the entire State system. [A. p. A-21]

The majority Opinion evinces no consideration for the State, the real defendant in this case. On these conclusory pleadings, the State is asked to defend itself from a possible

Federal Court takeover. Neither sovereign States nor individual defendants ought to be subjected to such an impossible burden and only a misreading of Rule 8 would impose such an obligation upon them.

II. THE HOLDING OF THE FOURTH CIRCUIT ABROGATES IN PRISONER LITIGATION THE REQUIREMENT THAT A PLAINTIFF MUST DEMONSTRATE HIS STANDING TO SUE AND ASSERT A REAL CASE OR CONTROVERSY BETWEEN HIMSELF AND THE DEFENDANT.

Although some inmate may have suffered some violation of his civil rights, the Complaint is just too vague to determine what wrong or wrongs each or any one of the plaintiffs may have suffered. The Complaint is in reality nothing more than a series of "generalized grievances" of the sort which are not sufficient to confer standing upon citizens or taxpayers. *Schlesinger v. Reservists To Stop The War*, 418 U.S. 208, 217 (1974); *Flast v. Cohen*, 392 U.S. 83, 96 (1968). The generalized interests which these inmates may share does not confer standing upon them. Not one of the Plaintiffs has demonstrated that he himself has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

It is elementary that "a litigant may only assert his own constitutional rights or remedies." *U.S. v. Raines*, 362 U.S. 17, 22 (1960), quoted in *McGowan v. Maryland*, 366 U.S. 420, 429 (1961). When a plaintiff seeks to bring a class action, he must establish that he himself has suffered a wrong which is of the same nature as that suffered by the class which he hopes to represent.

East Texas Motor Freight System, Inc. v. Rodriquez, ____ U.S. ____ (May 31, 1977). "To have standing to sue as a class representative it is essential that a plaintiff must be a part of that class, that is, he must possess the same interests and suffer the same injuries shared by all members of the class he represents." *Schlesinger*, 418 U.S. at 216. "[I]f none of the named plaintiffs . . . establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any member of the class which they purport to represent." *Rizzo v. Goode*, 423 U.S. 362, 373 (1976), citing *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). A cursory examination of the Complaint in this case shows that not one of the plaintiffs has pleaded how he himself as an individual has been injured by the conduct of the defendants.

There are more than 80 separate facilities spread across the State of North Carolina administered by the Department of Correction. Do plaintiffs mean to contend that exactly the same conditions exists in each unit so that each plaintiff (whether in maximum, medium or minimum custody) suffers the same constitutional deprivations? Do the plaintiffs contend that an "overcrowded" prison has the same effect on an inmate who has work or study release privileges as such a prison would have on an inmate who is in segregation? Has each of the defendants unconstitutionally interfered with the mail of each plaintiff? These rhetorical questions simply illustrate the total failure of each plaintiff here to show that he has standing to bring this lawsuit.

Of course all the inmate plaintiffs share the common denominator that they are each prisoners of the State of North Carolina and they share the common interest all such prisoners have in the administration of the system of which they are involuntarily a part. But as this Court held in *Schlesinger*, supra, 418 U.S. 220,

> . . . Standing to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensible element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution. It adds the essential dimension of specificity to the dispute by requiring that the complaining party has suffered a particular injury caused by the action challenged as unlawful.

Mr. Chief Justice Burger emphasized in *Schlesinger*, that "in the context of judicial review of regulatory agency action . . . whatever else the 'case or controversy' requirement embodied, its essence is a requirement of 'injury in fact.'" 418 U.S. at 218. This Court held in *O'Shea v. Littleton*, 414 U.S. at 494 that

> [a]bstract injury is not enough. It must be alleged that the Plaintiff "has sustained or is immediately in danger of sustaining some direct injury," as the result of the challenged statute or conduct. *Massachusetts v. Mellon*, 262 U.S. 447, 448, 67 L.Ed. 1078, 43 S.Ct. 597 (1923). The injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical."

The importance of the requirement that a plaintiff must have a real and concrete injury as enunciated so fully in *Schlesinger* is illustrated clearly by the instant case. The necessity of actual injury, as noted by Mr. Chief Justice Burger, serves a twofold purpose: (1) "'to show that . . . [plaintiff's] individual need requires the remedy for which he asks;" and (2) to insure "the framing of relief no broader than required by the precise facts to which the court's ruling would be applied." 418 U.S. at

222. In the instant case because of the complete absence of factual allegations, the Court would be unable to determine whether any plaintiff is entitled to the relief he seeks, nor can the Court tailor the relief to the facts of the case. The abandonment of the requirement to plead and prove a concrete injury suffered would "open the Judiciary to an arguable charge of providing government by injunction." 418 U.S. at 226. A federal system of government does not admit of the kind of remedy Plaintiffs seek here.

Even if, assuming arguendo, that the Plaintiffs' inmate status alone is sufficient to confer standing upon them, this vague complaint does not present issues "in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. at 95. These prisoners are asking the federal District Court to examine microscopically the North Carolina prison system and ferret out any constitutional violations therein. The Plaintiffs here are similar to those in *Laird v. Tatum*, 408 U.S. 1 (1972), who sought essentially

> a broad-scale investigation, conducted by themselves as private parties armed with the subpoena power of a federal district court and the power of cross-examination to probe into the Army's intelligence gathering activities, with the district court determining at the conclusion of that investigation the extent to which those activities may or may not be appropriate to the Army's mission. 408 U.S. at 14.

The prisoners here want the federal court to define what is and what is not constitutional in the prison system without their having in any given instance to plead a specific deprivation. What they seek from the federal courts is in essence an advisory opinion to which they are not entitled and which a federal court may not

constitutionally render. *United Public Workers v. Mitchell,* 330 U.S. 75 (1947). This Court has repeatedly refused to permit the federal courts to become instruments of "judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process." *Sierra Club v. Morton,* 405 U.S. 727, 740 (1972). The precedent set by the Fourth Circuit in finding this suit sufficiently pleaded would go a long way toward making the federal courts mere grievance mechanisms for prisoners and others who disagree generally or in principle with the way a prison or other government institution is being operated. Thus not only the State of North Carolina but others will feel the effects of this precedent if it is allowed to stand.

III. THE ACTION OF THE COURT OF APPEALS REVERSING THE DISTRICT COURT PERMITS A PURPORTED CLASS ACTION SUIT TO CIRCUMVENT THE RULES OF VENUE BY NAMING A NOMINAL DEFENDANT IN A REMOTE LOCATION, ALTHOUGH THE REAL DEFENDANT RESIDES OR THE REAL CAUSE OF ACTION AROSE IN ANOTHER DISTRICT.

Of the twenty-nine Plaintiffs, only eight were housed within the jurisdiction of the United States District Court for the Western District of North Carolina and they were housed in only four of the approximately eighty-four facilities across the State of North Carolina which constitute the Division of Prisons of the North Carolina Department of Correction. Six of the remaining twenty-one Defendants were housed in facilities within the Middle District of North Carolina and the remaining fifteen were housed within the Eastern District of North Carolina.

The North Carolina Department of Correction is an agency of the State of North Carolina created pursuant to Article 6 of Chapter 143B of the General Statutes of North Carolina. The governing authority of the Department of Correction includes a Secretary of Correction [G.S. 143B-263] appointed by the Governor [G.S. 143A-9] and the Board of Correction [G.S. 143B-265]. The offices of the Department of Correction are located and the functions of the Department of Correction are performed at 840 West Morgan Street, Raleigh, North Carolina, within the Raleigh Division of the United States District Court for the Eastern District of North Carolina. The Division of Prisons of the North Carolina Department of Correction is an agency of the State created pursuant to Article 6 of Chapter 143B and Chapter 148 of the General Statutes of North Carolina. The Division's offices are located and the functions of the Division are performed at 831 West Morgan Street, Raleigh, North Carolina.

Except for the Defendant Richard Smith, former Superintendent of the Craggy Correctional Institution at Asheville, *none* of the other Defendants were served within or are resident within the jurisdiction of the United States District Court for the Western District of North Carolina and the claims against those Defendants arose, if at all, within the jurisdiction of the United States District Courts for the Middle or Eastern Districts of North Carolina.

Actions under § 1983 are susceptible to the same venue considerations as other civil actions. 28 U.S.C. § 1391 is entitled "Venue Generally" and subsection (b) thereunder states:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the jurisdiction where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Except for naming as a nominal Defendant Richard Smith, former Superintendent of the Craggy Correctional Institution at Asheville, North Carolina, *none* of the Defendants are residents of the Western District of North Carolina and only eight of the Plaintiffs were housed within the Western District. The mere fact that eight of the Plaintiffs were housed within the Western District, and four are housed at the Craggy Institution does not provide the requisite link with the Western District of North Carolina to support venue over all the Defendants in the United States District Court for the Western District of North Carolina particularly whereas here it is *not* alleged that Smith individually harmed any prisoner.

For example, the Plaintiff seeks to obtain jurisdiction over L. V. Stephenson, Superintendent of the Caledonia Institution at Tillery, North Carolina. However, the Caledonia Institution is deep within the jurisdiction of the United States District Court for the Eastern District of North Carolina and is located more than 325 miles from Asheville and since the Plaintiffs seek to have the United States District Court for the Western District of North Carolina at Asheville control the North Carolina Department of Correction, it would be fair to assume that the Currituck County Subsidiary Prison Unit at Maple, North Carolina, is also included—although that unit is on the Atlantic Ocean 415 miles from Asheville. To properly translate such distances, it should be remembered that Raleigh, North Carolina, is 245 miles from Washington, D.C., or 387 miles from Philadelphia, Pennsylvania. Asheville is 205 miles from Atlanta, Georgia; 460 miles from Washington, D.C.; or 463 miles from Tallahassee, Florida, on the Gulf Coast. From these figures it is obvious that even if the United States District Court for the Western District at Asheville had venue over all the Defendants, which it does not, the case as filed by the Plaintiffs would lack manageability. Therefore, the District Court properly dismissed Plaintiffs' action without prejudice to their individual right to file civil rights actions which are properly pleaded, supported by factual allegations and within the venue of the Court.

IV. THE ACTION OF THE FOURTH CIRCUIT VIOLATES THE HOLDING OF THIS COURT IN *RIZZO v. GOODE*, 423 U.S. 362 (1976) AND *JONES v. NORTH CAROLINA PRISONERS' LABOR UNION*, 433 U.S. 119 (1977).

The Plaintiffs' cause of action seeks to lay a foundation for equitable intervention, such as that sought in *Rizzo v. Goode*, 423 U.S. 362 (1976). In *Rizzo*, the Supreme Court found that the requisite Article III case or controversy between the individuals named respondents and petitioners was lacking and therefore the judgment of the District Court constituted an unwarranted federal judicial intrusion into the discretionary authority of the Philadelphia authorities to perform their official functions as prescribed by state and local law, and by validating this type of litigation and granting the type of relief involved herein, the lower court had exceeded its authority under 42 U.S.C. § 1983. In this case the Plaintiffs' "Prayer for Relief" asks that the injunctive relief previously enumerated be granted, that certain standards governing the North Carolina Department of Correction be set by the District Court and monitored by a Citizens Committee, that inmates be released to reduce the inmate population and that, oxymoronically, that the Defendants be enjoined from the construction of further prison facilities. In essence, the Plaintiffs seek to have the United States District Court for the Western District of North Carolina usurp the power of the Governor of the State of North Carolina, the General Assembly of the State of North Carolina, the Secretary of the North Carolina Department of Correction, the North Carolina Parole Commission, and to take under its control the total management of the prison system of the State of North Carolina.

Mr. Justice Rehnquist spoke to the issue when writing for the majority in *Rizzo v. Goode*, supra, when he stated:

> . . . When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with "the well established rule that the government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'"...
>
> * * *
>
> . . . Where an injunction against criminal proceedings is sought under § 1983, "the principles of equity, comity, and federalism" must nonetheless restrain a federal court.
>
> * * *
>
> . . . We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local government such as respondents here. . . .

These statements by the Court in *Rizzo* caution any federal court to hesitantly employ the extraordinary remedy of an injunction upon a state agency. It is clear that this remedy is to be invoked only in a limited fashion and only upon the most extreme circumstances. In contrast, the Plaintiffs call for a total management of the prison system of the State of North Carolina by the federal courts while not stating injury. This is in total disregard of the Fourth Circuit's own clear and unequivocal disclaimer "that federal courts are [not] to assume the role of super wardens of state penal institutions. . . ." *Cooper v. Riddle*, 540 F.2d 731 (4th Cir. 1976).

As we have recently been reminded by this Court in *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977):

> Because the realitites of running a penal institution are complex and difficult, we have also recognized the wide-ranging deference to be accorded the decisions of prison administrators. We noted in *Procunier v. Martinez*, 416 U.S. 396, 405 (1974), that
>
> > "courts are ill-equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities." See also *Cruz v. Beto*, 405 U.S. 319, 321 (1972).

CONCLUSION

It is clear in fact that the Plaintiffs simply disagree with how the North Carolina prison system is being run. With no specific factual basis, Plaintiffs urge the federal court to undertake an across-the-board examination of every aspect of the North Carolina prison system, ferret out unconstitutional practices and order programs of a more enlightened (in their view) nature. How the prison system should be run is a question for the legislature and executive branches of the state government of North Carolina, not for the federal courts.

What the District Court did in dismissing these actions was simply to recognize the historic principle of federalism and apply it. As the District Court wrote,

> . . . [T]he Plaintiffs ask this Court to usurp the power of the North Carolina Department of Correction and

> take under its control and management the prison system of this sovereign state. This Court has no authority to follow such a course of conduct, and would refuse to do so under the circumstances if the power did exist. This refusal to act is founded and nurtured upon the principles of equity, comity and federalism which call for judicial restraint by the federal courts in the matters concerning the internal administration of a governmental agency. [A. p.A-26]

Yet the District Court did not close its doors to the legitimate grievances set forth in a matter "capable of resolution through the judicial process." The District Court declared in its Opinion:

> However, this is not to say that the Plaintiffs do not have an available avenue for redress, for this decision does not prejudice their rights to plead their cases individually upon the peculiar facts of each case. Section 1983 of 42 United States Code has staunchly protected the civil and constitutional rights of the prison population, as well as the total citizenry of this country. This statute protects all citizens from those who abuse authority purportedly conferred by state law, and provides a right and remedy in federal courts. The plaintiffs, who seek such broad relief in this Court today, may again come to this forum pleading the individual facts which support their respective cases. If the individual facts are meritorious and support the legal conclusions pleaded today, then this Court is bound by its office to afford proper relief. The legal conclusions, such as denial of adequate care, protection from violence and unlawful censorship of mail, have been established as grounds for relief under

§ 1983. See *Procunier v. Martinez*, 416 U.S. 396 (1974); *Woodhous v. Commonwealth of Virginia*, 487 F.2d 889 (4th Cir. 1973); *Blanks v. Cunningham*, 409 F.2d 220 (4th Cir. 1969). Nevertheless, facts must be pleaded and proven to support these legal conclusions before relief is available and certainly this relief cannot extend to a total usurpation of the state agency.

Respectfully submitted,

RUFUS L. EDMISTEN
Attorney General

JACOB L. SAFRON
Special Deputy Attorney General

JAMES PEELER SMITH
Assistant Attorney General

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76—2151

Thomas Bolding, Robert Fink, Samuel Bost, Raymond Creason, James Grant, Gerald R. Prince, Perry W. Franklin, Norman Anthony, Wilburt Clemmons, Jimmy Covington, Erwin Zelms, Marjorie H. Marsh, Timothy P. Harding, William R. McCall, Fred T. Malick, Glenn Ford, Jodie V. Austin, John H. Stacks, Charles L. Edmondson, Donald Perkins, Jim Vickers, Anne C. Willett, Gonzales Jones, Anne Sheppard Turner, Michael McSwiggen, Sherman Jones, Strother Holder, James Sapp, and Dennis Cole, and all others similarly situated,

Appellants,

v.

James E. Holshouser, Jr., individually and in his official capacity as Governor of North Carolina; David L. Jones, individually, and in his official capacity as Secretary of Social Rehabilitation and Control; Ralph D. Edwards, individually, and in his official capacity as Commissioner of the North Carolina Department of Correction; Jack Scism, individually, and in his official capacity as Chairman of the North Carolina Parole Commission; The North Carolina Parole Commission; The North Carolina Commission of Correction: J. Richard Smith, individually and in his official capacity as Superintendent of the Craggy Subsidiary of the North Carolina Department of Correction: E.C. Watkins, individually, and in his capacity as Superintendent of the Stanley County Subsidiary of the North Carolina Department of Correction: L. C. Stephenson, individually, and in his official capacity as Superintendent of the Caledonia Farms Subsidiary of the North Carolina Department of Correction: and Sam Garrison, individually, and in his capacity as Warden of Central Prison, and Fred Briggs, individually, and in his capacity as Chairman of the Central Classification Committee of the Department of Correction;

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Woodrow W. Jones, Chief Judge.

Argued December 5, 1977 **Decided April 26, 1978**

Before HAYNSWORTH, Chief Judge, BRYAN, Senior Circuit Judge, and WINTER, Circuit Judge.

Allen H. Wellons (Russell P. Brannon, Van Winkle, Buck, Wall, Starnes, Hyde & Davis on brief) for Appellants: Jacob L. Safron, Special Deputy Attorney General (Rufus L. Edmisten, Attorney General of North Carolina on brief) for Appellees.

WINTER, Circuit Judge:

The district court granted a motion under Rule 12(b)(6), F.R. Civ. P., to dismiss a complaint brought by a group of North Carolina prisoners, both individually and as representatives of all prisoners similarly situated in North Carolina prisons. The complaint sought a declaratory judgment that certain prison conditions and certain treatment of prisoners and their mail violated the constitutional rights of the prisoners under the

Federal Constitution and the Constitution of North Carolina. The major premise for the district court's ruling was that the complaint failed to state a claim upon which relief could be granted because it set forth merely legal conclusions unsupported by adequate factual allegations. The district court also expresed its unwillingness "to take under its control and management the prison system [of North Carolina]" in this or any other case, and to that end stated that it would not grant class relief although it would grant individual relief to any plaintiff who would plead and prove an individual right to relief. We reverse and remand the case for further proceedings.

Plaintiffs are twenty-nine prisoners incarcerated in thirteen penal institutions in various cities and towns in North Carolina. They sue the Governor of North Carolina, the Secretary of the Department of Social Rehabilitation and Control, the Director of Prisons and Commissioner of the Department of Correction, the persons constituting the North Carolina Parole Commission and those constituting the North Carolina Commission of Correction, the Chairman of the Central Classification Committee of the Department of Correction, and the various persons who are the Superintendents or Wardens of the various institutions in which plaintiffs are confined.

The plaintiffs' substantive allegations go to the charges of (1) overcrowding, (2) interference with prisoners' mail, (3) isolation, (4) denial of procedural due process at administrative hearings dealing with parole, transfer, disciplinary action and prisoner classification, and (5) general conditions. The task of summarizing them yet preserving their essential fullness is impossible, so we append as an appendix to this opinion the portion of the complaint dealing with each of these substantive complaints. The complaint charged that the acts and omissions of defendants amounted to (a) cruel and unusual punishment in violation of the Eighth Amendment and Article I, §27 of the

North Carolina Constitution, (b) denial of access to the courts and access to counsel in violation of the Sixth Amendment, and (c) denial of due process of law in violation of the Fourteenth Amendment.

Plaintiffs sought comprehensive declaratory and injunctive relief. They sought a declaration that each inmate was entitled to eighty square feet of living space, that conditions in the North Carolina prison system do not meet minimum constitutional standards, and that defendants violated plaintiffs' constitutional rights in the divers regards set forth in the substantive allegations. Both interim and permanent injunctive relief, albeit some of it conflicting, were sought, *inter alia,* to enjoin defendants from accepting new prisoners until minimun consititutional standards were met, to require defendants to parole prisoners to reduce unconstitutional overcrowding, to enjoin the construction of new prison facilities until programs for education, recreation and work-release were funded and developed, to enjoin defendants from interference with prisoners' mail, to enjoin the denial of hygienic needs, medical services, sanitary food service and access to reading and writing materials, and to require defendants to afford prisoners procedural due process with regard to their future status. The relief prayed also included a request for protecting plaintiffs against retaliation for bringing the suit, the appointment of a Citizens Committee to monitor compliance with any order granting relief and a reservation of jurisdiction until full compliance with any order entered by the court.

II.

Without expressing any view as to whether plaintiffs can prove all or any of the facts that they allege and, if so, whether they would be entitled to any or all of the exact relief that they pray, we disagree with the district court that plaintiffs have failed to state a claim upon which relief may be granted.

The adoption of the Federal Rules of Civil Procedure in 1938 marked the demise of common law pleading in the federal courts; in its place, the rules adopted the concept of notice pleading. Thus, Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 12(b)(6) must be given a construction consonant with this basic concept; detailed factual averments are no longer necessary to avoid dismissal of a claim. And in testing the sufficiency of compliance with Rule 8 when a Rule 12(b)(6) motion has been filed, Conley v. Gibson, 355 U.S. 41, 45-46 (1957), teaches that

> In appraising the sufficiency of the complaint, we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

This test was repeated more recently in Cruz v. Beto, 405 U.S. 319 (1972); and Haines v. Kerner, 404 U.S. 519, 521 (1972). *See also* Gordon v. Leeke, ____ F.2d ____ (4 Cir., Decided March 6, 1978).

In application of these principles, we think it manifest that plaintiffs' complaint is immune to dismissal under Rule 12(b)(6) in at least four of the five separate causes of action which are asserted.

A. With respect to overcrowding, plaintiffs have alleged that the prison facilities in the State of North Carolina "do not provide adequate personal living space for each individual prisoner," and as a result they allege that plaintiffs "are victims of and are in constant danger of violent and deadly attack;. . . [they] are victims of and face the persistent danger of rape and other sexual attack or molestation; . . . [and they]

suffer accumulating psychological damage from the high level of mental stress and fear." In addition, plaintiffs allege that as a result of the overcrowding they do not receive "adequate educational, recreational and work-release programs; . . . sanitary living conditions; . . . supplies for meeting basic personal hygiene; . . . adequate medical, psychological and dental care; . . . visitation rights; . . . [and] a functional classification system . . . [to] provide treatment for those individuals with emotional problems, safety for prisoners in general population, and means for prisoners to achieve personal improvement." These allegations are sufficiently factual to state a cognizable claim. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, rev'd in part,* Newman v. Alabama, 559, F.2d 283 (5 Cir. 1977).

B. With respect to interference with prisoners' mail, plaintiffs have alleged that defendants "unreasonably delayed the delivery of incoming mail and the posting of outgoing mail, and have. . . failed or refused to deliver incoming mail or post outgoing mail." Moreover, plaintiffs have alleged that defendants have delayed the delivery and the posting of attorney-client mail and at times have failed or refused to deliver or post such mail. Again, the allegations are sufficient to state a cognizable claim. *See* Procunier v. Martinez, 416 U.S. 396 (1974).

C. As to isolation, plaintiffs have alleged that their cells "do not meet minimum standards of the United States Public Health Service" and that plaintiffs are "not provided with three wholesome and nutritious meals a day;. . .are not provided with toilet articles necessary to keep up their own personal hygiene; . . .are not provided with adequate shower opportunities; . . . are not provided with clean and sanitary linen; and . . . are not provided with adequate exercise and recreation time. . . " These, too, are factual allegations sufficient to state a cognizable claim. *See* Sweet v. South Carolina Dept. of Corrections, 529 F.2d 854 (4 Cir. 1975).

D. In regard to general conditions, the plaintiffs allege that defendants have failed "to provide adequate sanitary food service facilities...." We think this allegation sufficient to state a cognizable claim.

E. Finally, with regard to their claims of procedural due process, we agree with the district court that plaintiffs have probably failed to allege a cognizable claim. Their only allegation is that defendants have failed "to provide meaningful hearings which comport with minimal standards of fairness" in regard to such matters as "parole, transfer, disciplinary action, and prisoner classification." While various decisions have recognized that procedural due process must be afforded in regard to such matters and have defined what process is "due" in each context, we are inclined to think that plaintiffs' allegations are so general and so broad that they state conclusions of law rather than a short and plain factual statement showing that plaintiffs are entitled to relief. If the claim of denial of procedural due process of law was plaintiffs' sole cause of action, we would agree, especially since plaintiffs were represented by counsel, that the complaint should be dismissed. However, any such dismissal should be with leave to amend within a reasonable period to correct the omissions and deficiencies of the pleader by supplying specific allegations concerning those practices which are claimed to violate the due process clause. Gordon v. Leeke, *supra*. Since this alleged cause of action is not plaintiffs' only cause of action, it is manifest that the entire complaint should not be dismissed, and since portions of the complaint, as we hold, are clearly immune from dismissal, we think that dismissal solely as to this cause of action is warranted but only with leave to amend.

Plaintiffs' complaint is broad in nature and sweeping in scope. We are constrained to add, therefore, that although we think that it is immune to dismissal under Rule 12(b)(6), it does not follow that the district court should proceed directly to

determining if a class should be certified and to trial without delineation and definition of the issues. Delineation and definition of the issues will undoubtedly have a direct bearing on whether a class should be certified and, if so, the description of the class. It may also disclose a basis on which the district court should sever the claims and order them tried separately. Rules 42(b) and 20(b). Perhaps even the trials of some severed claims should be transferred to the middle or the Eastern District of North Carolina. Leesona Corporation v. Cotwool Manufacturing Corporation, 308 F.2d 895 (4 Cir. 1962).

Under the Rules of Federal Procedure, the manner in which the issues are delineated and defined, as well as the factual basis for claims disclosed and sham claims eliminated, is not by the pleadings. Hodgson v. Virginia Baptist Hospital, Inc., 482 F.2d 821 (4 Cir. 1973). "The rules provide techniques more efficient than pleadings for performing [these] functions. The facts may be determined by discovery. The issues may likewise be narrowed by discovery or at a pretrial conference, or by 'partial summary Judgment' under Rule 56(d). Cases where there is no real controversy may be disposed of speedily and finally, on the merits, by summary judgment." C. Wright, Law of Federal Courts 319 (3d ed. 1976). Thus, we remind counsel for defendants and the district court that the proper path for them to pursue is not a motion under Rule 12(b)(6) but the various procedures authorized and described in Rules 16, 26-37, and 56.

III.

Because the district court went beyond dismissal of the complaint and indicated that it would never entertain a class suit granting class relief in a cause of this nature, we think it appropriate to remind the district court of the scope of a proper exercise of its jurisdiction in an appropriate case. We, of course, express no view on whether the proof which the plaintiffs may adduce represents such a case.

Recently the Supreme Court has cautioned against sweeping injunctions directed at state executive officials. Rizzo v. Goode, 423 U.S . 362 (1976). While *Rizzo* states that the principles of federalism militate against injunctive relief under 42 U.S.C. §1983 against the executive branch of state or local governments, *Rizzo* does not preclude recourse to broad injunctions when a clear pattern of unconstitutional conduct has been established. Specifically, *Rizzo* does not overrule Procunier v. Martinez, *supra,* where the Court, after stating that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform" (416 U.S. at 405), nevertheless added:

> But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. Johnson v. Avery, 393 U.S. 483, 486 (1969). 416 U.S. at 405-06.

We agree with the holding in Newman v. Alabama, 559 F.2d 283 (5 Cir. 1977), that, notwithstanding *Rizzo,* class relief requiring sweeping changes in a state prison system may still be mandated when the proof requires such relief.

In the district court, defendants asserted, as an alternative reason why their motion to dismiss should be granted, that only eight of the plaintiffs were confined in the four penal institutions located in the Western District of North Carolina in which suit was filed, that the remaining twenty-one plaintiffs were confined in penal institutions located in other districts of North Carolina, that all but one of the defendants reside and have their principal offices in districts of North Carolina other than the Western

District and that, therefore, the district court lacked venue except as to the eight plaintiffs confined within its territorial jurisdiction. In this regard, defendants' motion to dismiss was a motion under Rule 12(b)(3).

The district court did not find it necessary to rule on this aspect of the motion but defendants press this theory on us as a basis for sustaining the result, at least in part, reached by the district court.

We reject the contention. It is true that 28 U.S.C. §1391(b) states that non-diversity cases "may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law," but 28 U.S.C. §1392(a) makes special provision applicable to this case. It states that a civil action "not of a local nature, against defendants residing in different districts in the same State, may be brought in any of such districts." Since the instant case is a purported class suit against defendants residing in the several districts of North Carolina, venue lay, *inter alia,* in the Western District of North Carolina. This is not to say, however, that upon a proper showing the district court may not conclude to transfer the case to another district. The provisions of 28 U.S.C. §1404(a) state specifically that "[f]or the convenience of parties and witnesses" a district court possess the authority to transfer a civil action "to any other district. . .where it might have been brought."

We reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

ADDENDUM

After the foregoing opinion and Judge Bryan's dissent were circulated to the non-sitting judges, Judge Hall suggested that the case be reheard *in banc* and he requested a poll on his suggestion. The poll lost for lack of a majority of the votes of the judges entitled to vote therein.

For the reasons stated in Judge Bryan's dissenting opinion, Judge Russell, Judge Widener and Judge Hall dissent from the failure to rehear the case *in banc*.

APPENDIX

The substantive allegations of the complaint are contained in paragraph VII which follows:

STATEMENT OF CLASS CLAIM
Count One — Overcrowding

A. Defendants, by confining Plaintiffs within facilities under Defendants' control, have and continue to subject Plaintiffs to impermissible indignity because the majority, if not all, of the prison facilities in the State of North Carolina, as designed and constructed, violate the evolved standards of decency upheld, embodied, and protected by this society, in that they do not provide adequate personal living space for each individual prisoner.

B. By permitting and causing the prisoner population at each prison facility to exceed the designed capacity, the Defendants have subjected Plaintiffs to further degrading and inhumane deprivations.

C. The extreme overcrowding and its resultant effects has created an environment in which the evermounting tensions, fears, and frustrations prevent, disrupt and destroy normal human interaction. The Defendants are unwilling or unable to protect Plaintiffs from the unnatural behavior which results, to wit:

1. Plaintiffs are victims of and are in constant danger of violent and deadly attack;

2. Plaintiffs are victims of and face the persistent danger of rape and other sexual attack or molestation;

3. Plaintiffs suffer accumulating psychological damage from the high level of mental stress and fear.

D. Beyond the suffering caused by overcrowding itself, overcrowding results in the Plaintiffs being subjected to additional cruelties including, but not limited to, the following:

1. Defendants are unwilling or unable to provide adequate educational, recreational and work-release programs;

2. Defendants cannot, or have refused to, provide sanitary living conditions;

3. Defendants are unwilling or unable to provide adequate supplies for meeting basic personal hygiene needs of Plaintiffs;

4. Defendants do not provide adequate medical, psychological, and dental care for the Plaintiffs;

5. Defendants have increasingly curtailed visitation rights of Plaintiffs, due to lack of space which can be used as a visiting area;

6. Defendants are unable to operate a functional classification system which would provide treatment for those individuals with emotional problems, safety for prisoners in general population, and means for prisoners to achieve personal improvement.

Count Two — Mail

A. The Defendants, both intentionally and negligently, have interferred with the mail of Plaintiffs and others similarly situated in that they have unreasonably delayed the delivery of incoming mail and the posting of outgoing mail, and have at times failed or refused to deliver incoming mail or post outgoing mail.

B. The Defendants, both intentionally and negligently, have interferred with Plaintiffs' mail transmitted to and from their attorneys. Specifically, Defendants have unreasonably delayed the delivery of incoming, and the posting of outgoing, attorney-client mail, at times having failed or refused to deliver or post such mail. In addition, Defendants have engaged in the censorship of attorney-client mail and have inspected attorney-client mail without the prisoner-client being present.

C. Defendants' actions with regard to the mail of Plaintiffs and others similarly situated exceed the measures necessary to insure internal security in the prisons and deprive Plaintiffs of their rights of free speech, freedom of association, and access to counsel and the Courts.

Count Three — Isolation

The defendants in the past have placed, and continue to place, Plaintiffs in isolation (the hole) without providing them with safe and sanitary conditions, to-wit:

1. Plaintiffs' cells do not meet minimum standards of the United States Public Health Service;

2. Plaintiffs are not provided with three wholesome and nutritious meals a day;

3. Plaintiffs are not provided with toilet articles necessary to keep up their own personal hygiene;

4. Plaintiffs are not provided with adequate shower opportunities necessary to keep up their own personal hygiene;

5. Plaintiffs are not provided with clean and sanitary linen; and

6. Plaintiffs are not provided with adequate exercise and recreation time outside the cell.

Count Four — Administrative Hearings

The Defendants have failed to provide meaningful hearings which comport with minimum standards of fairness on matters determinative of Plaintiffs' future status, such as parole, transfer, disciplinary action, and prisoner classification.

Count Five — General Conditions

The Defendants have been guilty of other violations of the constitutional rights of the Plaintiffs not herein specifically alleged, including, but not limited to, the failure to provide adequate sanitary food service facilities and conditions, which violations, when taken together and in combination with the conditions and violations alleged in the previous counts, serve to further deprive the Plaintiffs of rights conferred upon them by the Constitutions of the United States and the State of North Carolina.

Albert V. Bryan, Senior Circuit Judge, dissenting:

Deferentially I disagree with today's basic holding. It is that the motion to dismiss the complaint under FRCiv.P12(b)(6)—failure to state a claim upon which relief can be granted—must be denied in this suit brought by twenty-nine inmates of thirteen State prisons, to have the Federal District court assume supervision of *all* seventy-seven of the prisons comprising the North Carolina system.

The very entertainment of the instant complaint, in my view, offends a fundamental of federalism: it is a bald, bold and entire usurpation of an official State function. Rizzo v. Goode, 423 US 362, 380 (1976). Argument to sustain the suit as one simply ill-pleaded ignores the integral and facial insufficiency in law of the complaint. Immediately its illegal concept is manifest in the compass of its allegations and prayers for their effectuation.

In this take-over, plaintiffs begin with the Governor, suing him and following through with the naming as defendants of apparently every officer whose duties might touch upon the State's policies and efforts in the punishment and correction of crime. Grievances asserted are termed as deprivations of the plaintiffs and of the "inmate population", as a whole, of rights under the Eighth Amendment of the Federal, and corresponding articles of the State constitution denouncing cruel and unusual punishments.

I.

The unacceptability of the suit appears at once from the declarations and injunctions prayed with regard to "over-crowding". A formal declaration is demanded "that the minimum living space required for each inmate" by the constitutions is 80 square feet.[1] Thereafter to be decreed are the following injunctions to the State officers:

1. Enjoinment of them "from accepting new prisoners until the inmate population is reduced to the point" of minimum constitutional standards "for *each* facility in the North Carolina prison system".

2. Command of the appropriate State departments "to release or parole sufficient numbers of prisoners eligible for parole or release" so as to reduce the inmate population at *each* correctional facility to "minimum constitutional standards".

3. Prohibiting defendants from construction anywhere of more prison facilities until Constitutionally acceptable programs for education, recreation and work-release are funded and developed.[2]

4. Ordering the appointment of "a Citizens Committee" for the North Carolina prison system, to be compensated by the State and invested with "general responsibility and authority to monitor and supervise the implementation of the Standards Order achieved by the [District] Court."

A more sweeping obtrusion upon the sovereignty of a State is not readily even to be conjectured. *All* imprisonments are to be stayed, no matter the gravity of the crimes of conviction. Starkly

---

[1]Incidentally, this court held in October 1977, Hite v. Leeke, 564 F2d 670, 673, that required occupancy by two prisoners of a cell 65 feet square is not a Constitutional deficiency.

[2]Noteworthy, Newman v. State of Alabama, 559 F2d 283, 291-2 (5 Cir. 1977) concluded that such provisions were not entitlements under the law.

evincing their interference, the plaintiffs ask the Federal court to *order* the State to grant paroles or releases to inmates so as to provide more space for the convicts remaining there. The parolees or releasees are to be returned to the street on order of the District Court, *non obstante* the concern and responsibility for the discharge of criminals through eligible for parole or pardon. Note, again, that *no* new prison facilities are to be constructed by the State until the programing, funding and development of education, recreation and work-release provisions are perfected for the incarcerated.

This arrogation of powers attributed by the plaintiffs to the Federal court is even more incomprehensible when judicial notice is taken, as it may be, that in North Carolina there are at least 77 penal establishments located in 67 counties, all of these considerations being embraced in this suit. *Haughey v. Rhay*, 300 F. Supp. 490, 494 (E.D. Wash. 1969); *Smith v. Bounds*, 538 F.2d 541,542 (4 Cir. 1975). This court in *Hite v. Leeke, supra*, 564 F.2d 670, (4 Cir. 1977 opinion by Circuit Judge Russell), exhaustively expounded with precedent, both decisional and commentary, the inhibitions upon the Federal court's invasion of a State's operation of her correctional system. I follow that exegesis. Finally, statewide oversight of this function is, under the prayer of the complaint, to be made the responsibility of a Citizens Committee. Further disclosure of the aim of a total taking over by the Federal Court at the instance of the plaintiffs is scarcely necessary.

Unlike the majority, I think that Rule 12(b)(6), FRCiv.P, warrants the dismissal of these portions of the complaint for "failure to state a claim upon which relief can be granted."

II.

Likewise deficient in stating a claim cognizable by the District Court are the complaint's remaining allegations and prayers for declarations and injunctions condemning: (a) the living space assigned for each inmate; (b) interference with prisoner's mail; and (c) in isolation the cells not meeting minimum standards of United States Public Health Service, three wholesome and nutritious meals each day not provided, toilet articles for personal hygiene not furnished, adequate shower opportunities not given, clean and sanitary linen not available, and adequate exercise and recreation time not afforded.

When the source of this listing as to any one unit is from a prisoner not an occupant thereof, the failure to make a cognizable case against it or the whole system becomes immediately apparent. All the instant accusations emanate from twenty-nine prisoners and all are against *each* of the 77 units in the penal system. However, it is not shown that together they can be informed of more than thirteen units, since their confinement is in them exclusively. Further, not one is shown to know of the conditions in more than one of these thirteen. Additionally, as will momentarily be seen, no more than five can speak of a single unit.

Complainants are incarcerated as follows: one is in one unit; one is in another unit; one in another; one in another; one in another; one in another, two are in still another; three in still another; three in still another; three in still another; four in still another; four in still another; and five in yet another. All of these units are separated by miles and each is in a different county. The obvious question is how, therefore, can they be heard to speak for conditions throughout the State or even in another unit? For example, how can one or several occupants of a unit appraise the

wholesomeness or nutrition of food served in the other seventy-six units. Similar inquiries occur as to handling of the mail, sanitation of living conditions, supplies for personal hygiene needs and visitation area. Like queries cover operation of the isolation cells in respect to hygienic items such as toilet articles, "shower opportunities", "Clean and sanitary linen", "exercise and recreation time outside the cell."

These are the facts, not my inferences, presented to the District Court. They constitute a blunderbuss complaint. The case fails on its facts; it fails on its face. So again, it was dismissible on motion under FRCiv.P 12(b)(6). While the factual inadequacy alone ends the action, this result finds support as a matter of law in this circuit in *Inmates v. Owens*, 561 F.2d 560, 562-3 (September 16, 1977) holding:

> "In order to state a civil rights claim upon which relief can be granted under 42 U.S.C. § 1983, one must allege that he, himself, sustained a deprivation of a right, privilege or immunity secured to him by the Constitution and laws of the United States. *Lopez v. Luginbill*, 483 F.2d 486, 488 (10th Cir. 1973). This was not done, and the complaint was properly dismissed."

III.

The doctrine of relaxation of pleading *pro se* by prison inmates has no play here, for the infirmity is not of form but in substance. The complaint was drawn and counseled by reputable attorneys. Notwithstanding the legal insufficiency of the complaint, its allegations and prayers are unmistakably and intentionally aimed at the prison system of North Carolina throughout. It is not a prison-by-prison assault. So to treat it so is to ignore and defeat the thesis of the pleader. Illustrating his

entire concept are the prayers against accepting new prisoners anywhere in the State, the construction of more facilities anywhere and the mandate of parole or other release of prisoners everywhere all focused on the system to reduce the existing population. In similar vein is the call for a committee of oversight for it all.

Nor does the resolution of this case depend upon whether the District Court can keep this litigation within practicable bounds. We must be mindful that the State is entitled to some consideration. Should a State be subjected to a deliberate broadside attack upon one of its major functions and then its defense be limited to a motion for more definite statements, submission of interrogatories, request for admissions, severances of the claims or other defensive procedures in the Rules? Entertainment of this action will invite generally complaints against a single prison to be framed as an action against the entire State system.

To my mind the District Court has judged altogether soundly. Its dismissal was not a prejudicial judgment. Plaintiffs were left free to bring separate appropriate actions for themselves and others suffering deprivations in the same prison.[3] I would affirm with such leave to plaintiffs.

FIELD, Senior Circuit Judge:

While I have no vote upon the en banc suggestion, I want to place myself on record as being in complete accord with the views expressed by Judge Bryan in his dissenting opinion in this case.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

ASHEVILLE DIVISION

A—C—76—74

FILED—AUG. 16 1976

THOMAS BOLDING, ROBERT FINK,
and others,

Plaintiffs,

vs.

JAMES E. HOLSHOUSER, JR., individually, and in his official capacity as
GOVERNOR OF NORTH CAROLINA, and others,

Defendants.

MEMORANDUM AND ORDER

The Plaintiffs, who are State prisoners, sue on behalf of themselves, individually, and on behalf of all others similarly situated, and bring this action under 42 U.S.C.A. 1983 seeking declaratory and injunctive relief. The Plaintiffs contend that the Defendants have violated their rights under the First, Sixth, Eighth, and Fourteenth Amendments of the United States

Constitution, as well as Article I, Section 27 of the North Carolina Constitution, in that the following alleged conditions exist in the North Carolina prisons: severe overcrowding, inadequate administration of hearing procedures, improper classification of inmates, inadequate and restricted programs for education, recreation, and work release, improper treatment of prisoners in solitary, and improper interference with the transmittal of prisoner mail. Based upon these alleged conditions the Plaintiffs ask this Court to provide the following injunctive relief:

a. Enjoining the Defendants from accepting any new prisoners into the North Carolina Prison System until inmate population is reduced to the point that minimum Constitutional standards are met.

b. Requiring that the North Carolina Department of Correction and Board of Paroles release or parole sufficient numbers of prisoners to reduce the inmate population to a level where minimum Constitutional standards are met.

c. Enjoining the construction of further prison facilities until Constitutionally acceptable programs for education, recreation, work-release, etc., are funded and developed.

d. Requiring the Defendants to make available to the Plaintiffs and others similarly situated basic items and facilities necessary for personal hygiene, adequate medical care, and adequate sanitary food service conditions, regardless of whether the inmate is in solitary or regular confinement.

e. Requiring the Defendants to develop and implement a classification plan which will insure the protection of the Plaintiffs and all others similarly situated from physical violence and other violations of their rights.

f. Enjoining the Defendants from censorship of, and other interference with inmate mail, except to search for contraband and then only in the presence of the inmate; and requiring the Defendants to expeditiously deliver mail addressed to or by prison inmates in accordance with the United States postal regulations.

g. Requiring the Defendants to accord the Plaintiffs and all others similarly situated fundamental due process rights, including notice and the right to a meaningful hearing, with respect to all significant actions affecting them.

The Defendants have moved to dismiss the action for failure to state a claim upon which the relief sought can be granted contending that the complaint is conclusory in nature with inadequate allegations in support thereof. The Defendants also contend that this Court lacks subject matter jurisdiction and is not the proper venue for this action.

A hearing on the Defendants' Motion was conducted by this Court at the July 1976 Term in Asheville. After a careful consideration of the pleadings, briefs, and oral arguments, the Court now enters its findings and conclusions.

It is well settled that general conclusory allegations unsupported by facts are insufficient to constitute a cause of action under 42 U.S.C.A. 1983. *Hoffman v. Halden*, 268 F.2d 280 (9th Cir. 1959); *Fletcher v. Hook*, 446 F.2d 14 (3rd Cir. 1971); *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970); *Colon v. State of*

N.Y. Division of Human Rights, 354 F.Supp. 343 (S.D. N.Y. 1973). Comparing the case at bar to this principle, it is clear that the Plaintiffs have merely asserted legal conclusions with no factual allegations in support thereof. The Plaintiffs fail to allege facts which would support a conclusion that the prisons are overcrowded; they fail to allege what inadequacies exist in hearing procedures; they fail to show in what way the classification of inmates is improper; they fail to enunicate the restrictions placed upon the programs for education, recreation, and work-release, and show in what way these programs are inadequate; and finally the Plaintiffs have failed to allege any acts of the Defendants which would support a finding that prisoners in solitary are improperly treated or that there is improper interference with their mail. Instead, the Plaintiffs have boldly and baldly made conclusory statements insufficient to state a cause of action under 42 U.S.C.A. 1983.

It is important to note that the case at bar is readily distinguishable from the class actions brought under Section 1983 in *Hague v. CIO*, 307 U.S. 496, 59 S.Ct. 954 (1939), or in *Allee v. Medrano*, 416 U.S. 802, 94 S.Ct. 2191 (1974), which are discussed in the recent Supreme Court decision of *Rizzo v. Goode*, 96 S.Ct. 598 (1976). In *Medrano* and *Hague* the enjoined conduct was premised upon a pervasive pattern of intimidation or upon deliberate policies of state officials. Only with this backdrop of a deliberate deprivation of civil and constitutional rights did the Supreme Court uphold the injunctions in those cases. More importantly, the Supreme Court opinion in *Medrano* recognized that the complaint in that case charged such a single plan. In contrast, the Plaintiffs in the instant case have alleged no such pattern or deliberate policy implemented by the Defendants to deprive them of their guaranteed rights. In summary, it appears to this Court that the Complaint fails to properly allege a cause of action under 42 U.S.C.A. 1983, and therefore the action should be dismissed.

Although it is not necessary to proceed further, the Court finds a comment on the relief sought is in order. The Plaintiffs' "prayer for relief" asks that the injunctive relief previously enumerated be granted, and that certain standards governing the North Carolina Department of Correction be set by the Court and monitored by a Citizens Committee. In short, the Plaintiffs ask this Court to usurp the power of the North Carolina Department of Correction and to take under its control and management the prison system of this sovereign State. This Court has no authority to follow such a course of conduct, and would refuse to do so under these circumstances if the power did exist. This refusal to act is founded and nurtured upon the principles of equity, comity, and federalism which call for judicial restraint by the federal courts into matters concerning the internal affairs of a governmental agency.

Mr. Justice Rehnquist addressed this issue when writing for the majority in *Rizzo v. Goode, supra,* when he said:

> "When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs' . . ."
>
> * * *
>
> " * * * Where an injunction against criminal proceeding is sought under §1983, 'the principles of equity, comity, and federalism' must nonetheless restrain a federal court."

* * *

> " * * * We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here. . ."

Certainly these statements by the court in *Rizzo* caution any federal court to hesitantly employ the extraordinary remedy of an injunction upon a state agency. It is clear that this remedy is to be invoked only in a limited fashion and only upon the most extreme circumstances. In contrast, the Plaintiffs in the instant case would call for total management of the prison system by the federal courts. The assumption of this duty would be rivaled only by the Union occupation of the conquered South. One hundred years have passed since the latter event, and this Court refuses to paternalize a state, or its agency, by assuming duties by nature belonging to that state. Therefore, it is the conclusion of this Court that the relief sought in this case as pleaded is beyond the powers of the federal judiciary and violative of the principles of federalism, comity, and equity.

However, this is not to say that these Plaintiffs do not have an available avenue for redress, for this decision does not prejudice their rights to plead their cases individually upon the peculiar facts of each case. Section 1983 of 42 United States Code has staunchly protected the civil and constitutional rights of the prison population, as well as the total citizenry of this country. This statute protects all citizens from those who abuse authority purportedly conferred by state law, and provides a right and a remedy in the federal courts. The Plaintiffs, who seek such broad relief in this Court today, may again come to this forum pleading the individual facts which support their respective cases. If the

individual facts are meritorious and support the legal conclusions pleaded today, then this Court is bound by its office to afford proper relief. The legal conclusions, such as denial of adequate medical care, protection from violence, and unlawful censorship of mail, have been established as grounds for relief under Section 1983. See *Procunier v. Martinez,* 416 U.S. 396 (1974); *Woodhous v. Commonwealth of Virgnia,* 487 F.2d 889 (4th Cir. 1973); *Blanks v. Cunningham,* 409 F.2d 220 (4th Cir. 1969). Nevertheless, facts must be pleaded and proven to support these legal conclusions before relief is available, and certainly this relief cannot extend to a total usurpation of a state agency.

Therefore, the Court finds that the dismissal of the Plaintiffs' Complaint for failure to state a cause of action is in order. This dismissal is without prejudice to the Plaintiffs, for the courts remain available to hear future actions they may file which are properly pleaded and which are supported by factual allegations. Furthermore, the Court finds that the stated claims under the North Carolina constitution should also be dismissed.

IT IS, THEREFORE, ORDERED that the Defendants' Motion to Dismiss be, and the same is hereby granted. The Clerk is directed to send a copy of this Memorandum and Order to Plaintiffs' attorney and to the Attorney General of North Carolina.

This the 4th day of August, 1976.

/s/ Woodrow W. Jones
Chief Judge

IN THE
DISTRICT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Asheville Division

Filed May 10, 1976

Civil No. A-C-76-74

THOMAS BOLDING, ROBERT FINK, SAMUEL BOST, RAYMOND CREASON, JAMES GRANT, GERALD R. PRICE, PERRY W. FRANKLIN, NORMAN ANTHONY, WILBURT CLEMMONS, JIMMY COVINGTON, ERWIN ZELMS, MARJORIE H. MARSH, TIMOTHY P. HARDING, WILLIAM R. McCALL, FRED T. MALICK, GLENN FORD, JODIE V. AUSTIN, JOHN H. STACKS, CHARLES L. EDMONDSON, DONALD PERKINS, JIM VICKERS, ANNE C. WILLETT, GONZALES JONES, ANNE SHEPPARD TURNER, MICHAEL McSWIGGEN, SHERMAN JONES, STROTHER HOLDER, JAMES SAPP and DENNIS COLE, and all others similarly situated,

Plaintiffs,

v.

JAMES E. HOLSHOUSER, JR., individually, and in his official capacity as GOVERNOR OF NORTH CAROLINA; DAVID L. JONES, individually, and in his official capacity as SECRETARY OF SOCIAL REHABILITATION AND CONTROL; RALPH D. EDWARDS, individually, and in his official capacity as COMMISSIONER OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION; JACK SCISM, individually, and in his official capacity as CHAIRMAN OF THE NORTH CAROLINA PAROLE COMMISSION; THE NORTH CAROLINA PAROLE COMMISSION: THE NORTH CAROLINA COMMISSION OF CORRECTION: J. RICHARD SMITH, individually, and in his official capacity as SUPERINTENDENT OF THE CRAGGY SUBSIDIARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION: E.C. WATKINS, individually, and in his capacity as SUPERINTENDENT OF THE STANLEY COUNTY SUBSIDIARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION: L. C. STEPHENSON, individually, and in his official capacity as SUPERINTENDENT OF THE CALEDONIA FARMS SUBSIDIARY OF THE NORTH CAROLINA DEPARTMENT OF CORRECTION: and SAM GARRISON, individually, and in his capacity as WARDEN OF CENTRAL PRISON, and FRED BRIGGS, individually, and in his capacity as CHAIRMAN OF THE CENTRAL CLASSIFICATION COMMITTEE OF THE DEPARTMENT OF CORRECTION,

Defendants.

I.

PRELIMINARY STATEMENT

This action is brought to obtain a Declaratory Judgment that the North Carolina prison system, as presently administered and existing, violates the First, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as Article I, Section 27 of the Constitution of North Carolina, as applied to the inmates therein, because of severe overcrowding, inadequate administering of hearing procedures, improper classification of inmates, inadequate and restricted programs for education, recreation, and work release, improper treatment of prisoners in solitary, improper interference with the transmittal of prisoner mail, and other equally significant failings; and this action has the further aim of obtaining a preliminary and permanent injunction:

(a) Enjoining the Defendants from accepting any new prisoners into the North Carolina Prison System until inmate population is reduced to the point that minimum Constitutional standards are met.

(b) Requiring that the North Carolina Department of Correction and Board of Paroles release or parole sufficient numbers of prisoners to reduce the inmate population to a level where minimum Constitutional standards are met.

(c) Enjoining the construction of further prison facilities until Constitutionally acceptable programs for education, recreation, work-release, etc., are funded and developed.

(d) Requiring the Defendants to make available to the Plaintiffs and others similarly situated basic items and

facilities necessary for personal hygiene, adequate medical care, and adequate sanitary food service conditions, regardless of whether the inmate is in solitary or regular confinement.

(e) Requiring the Defendants to develop and implement a classification plan which will insure the protection of the Plaintiffs and all others similarly situated from physical violence and other violations of their rights.

(f) Enjoining the Defendants from censorship of, and other interference with inmate mail, except to search for contraband and then only in the presence of the inmate; and requiring the Defendants to expeditiously deliver mail addressed to or by prison inmates in accordance with the United States postal regulations.

(g) Requiring the Defendants to accord the Plaintiffs and all others similarly situated fundamental due process rights, including notice and the right to a meaningful hearing, with respect to all significant actions affecting them.

II.

JURISDICTION

This is a class action for declaratory and injunctive relief to redress the deprivation of rights secured to Plaintiffs by the Constitution of the United States. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. 1343 (3).

III.

CAUSES OF ACTION

The jurisdiction of this Court is invoked to secure protection, and to redress deprivation of rights, privileges, and immunities secured by Title 42 U.S.C. 1983; the First, Sixth, and Eighth Amendments to the Constitution of the United States; the due process clause of the Fourteenth Amendment to the Constitution of the United States; ARTICLE I, Section 17 of the Constitution of North Carolina; and pursuant to the Declaratory Judgment Act, 28 U.S.C. 2001 *et seq.*

IV.

CLASS ACTION

The Plaintiffs bring this action on behalf of themselves, individually, and as a class action on behalf of all others similarly situated pursuant to Rule 23 (a) and (b), 2, of the Federal Rules of Civil Procedure. The class is defined as consisting of all persons presently confined by the North Carolina Department of Correction or who may be so confined in the future. Members of the class on behalf of whom the Plaintiffs sue are in excess of twelve thousand persons and are so numerous that joinder of all is impracticable. The questions of law and fact presented by the named Plaintiffs are common to the class, as are the claims presented by the class representatives. Also, the representation provided the named Plaintiffs will adequately protect the interests of the class as a whole. The Defendants themselves have acted or refused to act on grounds generally applicable to the class, thereby making appropriate declaratory and injunctive relief with respect to the class as a whole.

V.

PARTIES PLAINTIFF

The Plaintiffs are residents of the State of North Carolina and are inmates at various prison facilities in this state. The Plaintiffs Raymond Creason, Gerald R. Price, Gonzales Jones, and Norman Anthony currently are incarcerated in the Craggy Subsidiary Unit of the North Carolina Department of Correction near Asheville, North Carolina; the Plaintiffs Robert Fink, Sherman Jones, Michael McSwiggen, and Jimmy Covington are presently incarcerated in the Caledonia Farm Subsidiary Unit of the North Carolina Department of Correction at Tillery, North Carolina; the Plaintiff Samuel Bost is currently incarcerated at the Rowan County Subsidiary Unit at Salisbury, North Carolina; the Plaintiffs Marjorie W. Marsh, Anne Sheppard Turner, and Ann C. Willett, are currently incarcerated at the Women's Correctional Center of the North Carolina Department of Correction at Raleigh, North Carolina; the Plaintiff Wilbert Clemmons is currently incarcerated at the Iredell County Subsidiary Unit in Statesville, North Carolina; the Plaintiff James E. Grant is currently incarcerated at the Stanley County Subsidiary Unit at Albemarle, North Carolina; the Plaintiffs Perry W. Franklin, Dennis Cole, and Strother Holder are currently incarcerated at the Randolph County Subsidiary Unit in Asheboro, North Carolina; the Plaintiffs Donald Perkins and Jim Vickers are currently incarcerated at the Odom Subsidiary Unit at Jackson, North Carolina; the Plaintiff Erwin Zelms is currently incarcerated at the Lincoln County Subsidiary Unit at Lincolnton, North Carolina; that the Plaintiffs Thomas Bolding, Timothy P. Harding, William R. McCall, Charles Edmondson, and Glenn Ford are currently incarcerated at the Central Prison Facility of the North Carolina Department of Correction in Raleigh, North Carolina; that the Plaintiff Fred Malick is currently incarcerated at the Guilford

County Subsidiary Unit No. 1 near High Point, N.C.; the Plaintiffs Jodie V. Austin and John H. Stacks are currently incarcerated at the Union County Subsidiary Unit at Monroe, North Carolina; and the Plaintiff James Sapp is currently incarcerated at the Triangle Correctional Center in Raleigh, North Carolina.

VI.

PARTIES DEFENDANT

The Defendant Holshouser is Governor of the State of North Carolina and has final authority and responsibility over the prison system of this State; the Defendant David L. Jones is Secretary of the Department of Social Rehabilitation and Control, which Department includes the North Carolina Department of Correction, and he is also Ex-Officio Chairman of the North Carolina Commission of Correction; the Defendant Ralph D. Edwards is Director of Prisons and Commissioner of the Department of Correction and has immediate responsibility for the administration and operation of the North Carolina prison system; the Defendant Jack Scism is Chairman of the Parole Commission of the State of North Carolina and oversees the operation of the parole system in this State; the North Carolina Parole Commission, in addition to Chairman Scism, is composed of James E. Cline, Grady D. Davis, C. Dempsey McDaniel, and Isabel Holmes, and is the agency making final decisions on paroles; the North Carolina Commission of Correction is composed of Johnnie L. Gallemore, Clarence C. Malone, Jr., W. H. S. Burgwyn, Jr., Florence Nelson Crisp, William S. Anderson, Leon Raymond Camp, Robert C. Carroll, and William T. Graham, and has the responsibility of establishing policies and procedures for the operation of the correctional system in this state; the Defendant J. Richard Smith

is Superintendent of the Craggy Subsidiary Unit of the North Carolina Department of Correction and has immediate control over the operation of that facility; the Defendant E. C. Watkins is Superintendent of the Stanley County Subsidiary Unit of the North Carolina Department of Correction and has immediate control over the operation of that unit; the Defendant L. C. Stephenson is Superintendent of the Caledonia Farm Subsidiary Unit and has immediate control over the operation of that unit: the Defendant Sam Garrison is the Warden of Central Prison in Raleigh and has immediate control over the operation of that facility; and the Defendant Fred Briggs is Chairman of the Central Classification Committee of the Department of Correction.

VII.

STATEMENT OF CLASS CLAIM

Count One—Overcrowding

A. Defendants, by confining Plaintiffs within facilities under Defendants' control, have and continue to subject Plaintiffs to impermissible indignity because the majority, if not all, of the prison facilities in the State of North Carolina, as designed and constructed, violate the evolved standards of decency upheld, embodied, and protected by this society, in that they do not provide adequate personal living space for each individual prisoner.

B. By permitting and causing the prisoner population at each prison facility to exceed the designed capacity, the Defendants have subjected Plaintiffs to further degrading and inhumane deprivations.

C. The extreme overcrowding and its resultant effects has created an environment in which the evermounting tensions, fears, and frustrations prevent, disrupt and destroy normal human interaction. The Defendants are unwilling or unable to protect Plaintiffs from the unnatural behavior which results, to-wit:

1. Plaintiffs are victims of and are in constant danger of violent and deadly attack;

2. Plaintiffs are victims of and face the persistent danger of rape and other sexual attack or molestation;

3. Plaintiffs suffer accumulating psychological damage from the high level of mental stress and fear.

D. Beyond the suffering caused by overcrowding itself, overcrowding results in the Plaintiffs being subjected to additional cruelties including, but not limited to, the following:

1. Defendants are unwilling or unable to provide adequate educational, recreational, and work-release programs;

2. Defendants cannot, or have refused to, provide sanitary living conditions;

3. Defendants are unwilling or unable to provide adequate supplies for meeting basic personal hygiene needs of Plaintiffs;

4. Defendants do not provide adequate medical, psychological, and dental care for the Plaintiffs;

5. Defendants have increasingly curtailed visitation rights of Plaintiffs, due to lack of space which can be used as a visiting area;

6. Defendants are unable to operate a functional classification system which would provide treatment for those individuals with emotional problems, safety for prisoners in general population, and means for prisoners to achieve personal improvement.

Count Two—Mail

A. The Defendants, both intentionally and negligently, have interfered with the mail of Plaintiffs and others similarly situated in that they have unreasonably delayed the delivery of incoming mail and the posting of outgoing mail, and have at times failed or refused to deliver incoming mail or post outgoing mail.

B. The Defendants, both intentionally and negligently, have interfered with Plaintiffs' mail transmitted to and from their attorneys. Specifically, Defendants have unreasonably delayed the delivery of incoming, and the posting of outgoing, attorney-client mail, at times having failed or refused to deliver or post such mail. In addition, Defendants have engaged in the censorship of attorney-client mail and have inspected attorney-client mail without the prisoner-client being present.

C. Defendants' actions with regard to the mail of Plaintiffs and other similarly situated exceed the measures necessary to insure internal security in the prisons and deprive Plaintiffs of their rights of free speech, freedom of association, and access to counsel and the Courts.

Count Three—Isolation

The Defendants in the past have placed, and continue to place, Plaintiffs in isolation (the hole) without providing them with safe and sanitary conditions, to-wit:

1. Plaintiffs' cells do not meet minimum standards of the United States Public Health Service;

2. Plaintiffs are not provided with three wholesome and nutritious meals a day;

3. Plaintiffs are not provided with toilet articles necessary to keep up their own personal hygiene;

4. Plaintiffs are not provided with adequate shower opportunities necessary to keep up their own personal hygiene;

5. Plaintiffs are not provided with clean and sanitary linen; and

6. Plaintiffs are not provided with adequate exercise and recreation time outside the cell.

Count Four—Administrative Hearings

The Defendants have failed to provide meaningful hearings which comport with minimum standards of fairness on matters determinative of Plaintiffs' future status, such as parole, transfer, disciplinary action, and prisoner classification.

Count Five—General Conditions

The Defendants have been guilty of other violations of the constitutional rights of the Plaintiffs not herein specifically alleged, including, but not limited to, the failure to provide adequate sanitary food service facilities and conditions, which violations, when taken together and in combination with the conditions and violations alleged in the previous counts, serve to further deprive the Plaintiffs of rights conferred upon them by the Constitutions of the United States and the State of North Carolina.

VIII.

PRAYER FOR RELIEF

As a result of the conditions existing in the North Carolina prison system as a whole, and of the actions and inaction of the Defendants, the Plaintiffs and the inmate population as a whole have been, and continue to be, subjected to cruel and unusual punishment in violation of the Eighth Amendment and Article I, Section 27 of the Constitution of North Carolina, deprived of their access to the courts and their access to counsel in violation of the Sixth Amendment, and deprived of their rights to due process in violation of the Fourteenth Amendment. The deprivation of their constitutional rights have caused, are causing, and will continue to cause Plaintiffs and members of their class serious and irreparable injury and harm for which they have no plain, adequate, or complete remedy or redress other than a suit for injunctive relief.

WHEREFORE, Plaintiffs pray that this Court:

1. Declare that the minimum living space required for each inmate by the Eighth and Fourteenth Amendments to the United States Constitution is eighty (80) square feet.

2. Declare that conditions in the North Carolina prison system as a whole do not meet minimum constitutional standards and that the Defendants have thereby violated the Plaintiffs' rights under the Eighth Amendment as applied to the States through the Fourteenth Amendment to the United States Constitution.

3. That the Defendants have violated Plaintiffs First and Sixth Amendment rights in their handling of prisoners' mail, have violated the Eighth Amendment prohibition against cruel and unusual punishment by permitting the severe overcrowding now present in the prison system and by their treatment of prisoners relegated to solitary confinement and have violated the Fourteenth Amendment due process clause by their arbitrary and capricious actions with respect to administrative hearing.

4. Enter a preliminary injunction enjoining the Defendants from accepting new prisoners until the inmate population is reduced to the point that minimum Constitutional standards are met for each facility in the North Carolina prison system.

5. Enter a mandatory injunction requiring the Department of Correction and Board of Paroles of the State of North Carolina to release or parole sufficient numbers of prisoners eligible for parole or release to reduce the inmate population at each facility to a level where minimum constitutional standards are met.

6. Enter a preliminary injunction enjoining Defendants from the construction of further prison facilities until constitutionally acceptable programs for education, recreation, and work-release are funded and developed.

7. Enter a preliminary and permanent injunction enjoining the Defendants from censorship of inmates' mail other than the search for contraband in their presence and requiring the Defendants to expeditiously deliver mail addressed to or by prison inmates in accordance with United States Postal regulations.

8. Enter an Order temporarily and permanently enjoining the Defendants from denying prison inmates' basic personal hygiene needs and adequate sanitary food service, and from denying inmates in solitary confinement the opportunity to bathe daily, to engage in adequate exercise daily, to have access to reading and writing materials, to be supplied with the same personal hygiene articles, linens, and meals as are provided to the general inmate population, and to adequate medical, psychological, and dental care on a regular basis.

9. Enter an Order requiring the Defendants to give inmates adequate notice of all actions determinative of their future status and to provide fair and meaningful hearings in connection with such actions.

10. Enter a preliminary and permanent injunction enjoining, during the pendency of this action, the Defendants or their successors or agents from harassing, punishing or retaliation in any way against the Plaintiffs for filing this action, including the transfer of any Plaintiff without his express consent.

11. Enter an Order appointing a Citizens Committee for the North Carolina prison system, said Committee to be compensated by the State of North Carolina and to have the general responsibility and authority to monitor and supervise the implementation of the Standards Order achieved by this Court.

12. Retain jurisdiction over this action to insure that the Defendants comply with the minimum constitutional standards required by this Court's Order and the Constitution of the United States, and to grant such further relief as the Court deems just and proper under the circumstances.

13. That the Defendants be required to pay the Plaintiffs' costs reasonably incurred in prosecuting this action and that the Defendants be required to pay the Plaintiffs' attorneys fees as approved by the Court.

VAN WINKLE, BUCK, WALL,
STARNES, HYDE AND DAVIS,
P.A.

/s/ RUSSELL P. BRANNON

18 Church Street
P.O. Box 7376
Asheville, North Carolina 28807
(704) 258-2991

/s/ ALLEN H. WELLONS

Western Carolina Bank Building
Asheville, North Carolina 28801
(704) 252-8226

ATTORNEYS FOR PLAINTIFFS

Individual cases filed by the Plaintiffs include the following:

Thomas Bolding

Raymond Creason, Tommy Bolding, Robert Fink, Samuel Bost v. David L. Jones, No. C-75-429-G (M.D. N.C., February 8, 1977), pending appeal, No. 77-1532 (4th Cir.). (Challenging conditions of confinement at the Stanly County Subsidiary at Albemarle, North Carolina, within the Middle District of North Carolina.)

Robert Fink

Raymond Creason, Robert Fink, et al. v. Jones, supra.

Fink v. Jones, No. 77-0010-CRT (E.D. N.C.) (Alleges denial of due process in inmate transfer between units.)

Samuel Bost

Raymond Creason, Samuel Bost, et al. v. Jones, supra.

Bost v. Watkins, No. C-76-57-G (M.D. N.C., March 3, 1977) (Alleges interference with mail.)

Raymond Creason

Creason, et al. v. Jones, supra.

Creason v. Board of Paroles, No. 74-78-CRT-5 (E.D. N.C., March 22, 1974), aff'd on appeal, No. 75-1534 (4th Cir., June 3, 1975) (Alleges denial of parole due to prior record.)

Creason v. Hunt, No. A-77-29 (W.D. N.C., July 29, 1977) (Alleges denial of due process in parole consideration)

Creason v. Boone, No. C-C-77-101 (W.D. N.C.) (Alleges denial of right to post conviction transcripts by court reporter.)

James Grant

James Robert Grant v. D. G. Luther, No. C-C-75-212 (W.D. N.C., May 9, 1977) (Alleges a denial of adequate dental care. After presentation of evidence, the jury answered the issues in favor of the Defendants.)

Jimmy Covington

Covington v. Jones, No. 4531-Raleigh (E.D. N.C., March 27, 1974) (Alleges that maximum security wing of Central Prison constitutes cruel and unusual punishment; that disciplinary proceedings were unconstitutional; and that he was being denied equal protection.)

Covington v. Garrison, No. 74-93-CRT (E.D. N.C., September 4, 1974) (Alleges that Defendants inspected his shoes in an unconstitutional manner.)

Covington v. Garrison, No. 74-149-CRT (E.D. N.C., December 10, 1974) (Seeking credit for time in custody pending trial, appeal and while free on parole.)

Covington v. Caudle, No. 74-254-CRT (E.D. N.C., February 28, 1975) (Alleges denial of due process upon being placed in administrative segregation. Also alleges that conditions constitute cruel and unusual punishment.)

Covington v. Turner, No. C-74-347-G (M.D. N.C., September 15, 1976) (Alleges denial of due process in transfer and classification proceedings.)

Covington v. Oakes, No. C-74-377-G (M.D. N.C., September 15, 1976) (Seeks access to a typewriter and xerox machine.)

Covington v. Dixon, No. 75-0091-CRT-5 (E.D. N.C., October 12, 1975) (Alleges double jeopardy as a result of refusal to work, i.e., disciplinary and reclassification proceedings.)

Covington v. Dixon, No. 75-0163-CRT-5 (E.D. N.C., October 20, 1975) (Same allegations as *Covington v. Dixon,* No. 75-0091-CRT-5, supra.)

Covington v. Brannon, No. C-75-27-G (M.D. N.C., February 3, 1975), aff'd on appeal, No. 75-1309 (4th Cir., October 28, 1975) (Civil rights case contesting state court conviction.)

Covington v. Austin, No. 76-0084-CRT (E.D. N.C., June 24, 1976) (Alleges an illegal search of property.)

State v. Covington, No. 67 CR 11074 (Durham County Superior Court, September 28, 1976) (Plenary state court habeas corpus hearing upon allegation of unconstitutionality of state indeterminate sentence status.

Covington v. Scism, No. 76-199-CRT (E.D. N.C., May 16, 1977) (Alleges a right to release upon completion of minimum portion of indeterminate sentence. Contentions similar to those presented in the state court habeas proceeding, *State v. Covington,* supra.)

Erwin Zelms

Zelms v. Watkins, No. 317-G-73 (M.D. N.C., August 30, 1974) (Alleges a plethora of contentions concerning conditions of confinement at the Stanly County Subsidiary within the jurisdiction of the United States District Court for the Middle District of North Carolina.)

Marjorie H. Marsh

Barnes, Marsh, et al. v. Holshouser, No. 75-0362-CRT (E.D. N.C., December 4, 1975) (Alleges unconstitutional conditions of confinement at the North Carolina Correctional Center for Women at Raleigh within the jurisdiction of the United States District Court for the Eastern District of North Carolina.)

William R. McCall

McCall v. Caldwell, No. A-75-30 (W.D. N.C., April 21, 1975) (Alleges violation of right to due process by transfer from Craggy Correctional Institution to Yancey County Subsidiary.)

Jodie Vernon Austin

Austin v. Griffin, No. C-C-76-126 (W.D. N.C., November 24, 1976), aff'd on appeal, Nos. 76-8422/23 (4th Cir., May 13, 1977) (Civil rights suit for damages against district attorney, defense counsel and sheriff.)

Austin v. Luther, No. 76-8060 (4th Cir., January 7, 1977); *Austin v. North Carolina,* No. 76-8061 (4th Cir., January 7, 1977) (Consolidated appeals affirming District Court denial of leave to file in forma pauperis. Austin owns land worth approximately $35,000.)

See, also, the following consolidated cases affirmed on appeal:

No. 75-8360, *Austin v. Fowler;* No. 75-8441, *Austin v. United States District Court;* No. 75-8442, *Austin v. Austin;* No. 75-8443, *Austin v. United States District Court;* No. 76-8063, *In Re Austin* (4th Cir., March 31, 1976).

Austin v. Jones, No. A-C-76-176 (W.D. N.C., December 27, 1976) (Alleges unconstitutionality of conditions at the Craggy Correctional Institution.)

Charles L. Edmondson

Edmondson v. Jones, No. 76-0164-CRT (E.D. N.C., February 11, 1977) (Alleges unconstitutionality of conditions of confinement for safekeepers at North Carolina Central Prison within the jurisdiction of the United States District Court for the Eastern District of North Carolina.)

Jim Vickers

Vickers v. Jones, No. C-75-369-G (M.D. N.C., August 8, 1977) (Complains of visiting facilities at Blanch Correctional Institution within the jurisdiction of the United States District Court for the Middle District of North Carolina.)

Vickers v. Jones, No. 76-0119-CRT (E.D. N.C., October 15, 1976) aff'd on appeal, No. 77-1501 (4th Cir., April 21, 1977) (Alleges a refusal to supply more than one set of clean clothes a week.)

Vickers v. Sanders, No. 76-197-CRT (E.D. N.C., August 16, 1977) (Alleges unconstitutionality of conditions of confinement at Caledonia Correctional Institution at Tillery within the jurisdiction of the United States District Court for the Eastern District of North Carolina.)

Anne C. Willett

Barnes, Willett, et al. v. Holshouser, No. 75-0362-CRT (E.D. N.C., December 4, 1975) (Alleges unconstitutionality of conditions at the Correctional Center for Women at Raleigh within the jurisdiction of the United States District Court for the Eastern District of North Carolina.)

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 1978, three copies of this Petition for Writ of Certiorari were served upon the following parties via U.S. Priority Mail:

Russell P. Brannon, Esquire
Van Winkle, Buck, Wall, Starnes, Hyde
and Davis, P.A.
Post Office Box 7376
Asheville, North Carolina 28807

Allen H. Wellons, Esquire
Slawter and Wellons
Post Office Box 7552
Asheville, North Carolina 28807

Respectfully submitted,

JAMES PEELER SMITH
Assistant Attorney General

Ruffin Building
P.O. Box 629
Raleigh, North Carolina

Counsel for Petitioners

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

Supreme Court, U. S.
FILED
SEP 5 1978
MICHAEL RODAK, JR., CLERK

NO. **77-1843**

JAMES E. HOLSHOUSER, JR., et al.,

Petitioners

v.

THOMAS BOLDING, et al.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

VAN WINKLE, BUCK, WALL, STARNES,
HYDE & DAVIS, P. A.

By: Russell P. Brannon

Post Office Box 7376
Asheville, North Carolina 28807
Phone: (704) 258-2991

ALLEN H. WELLONS
Post Office Box 7661
Asheville, North Carolina 28807

Counsel for Respondents

INDEX

	Page
QUESTIONS PRESENTED	1
STATUTES INVOLVED	1
STATEMENT OF THE CASE AND FACTS	1
ARGUMENT	2
CONCLUSION	6

CITATIONS

	Page
Cases:	
Allee v. Medrano, 416 U.S. 802 (1974)	9
Bounds v. Smith, 403 U.S. 817 (1977)	8
Conley v. Gibson, 355 U.S. 41, 46 (1957)	4,7
Cruz v. Beto, 405 U.S. 519, 521 (1972)	4
Estelle v. Gamble, 429 U.S. 97 (1976)	4,5
Hague v. CIO, 307 U.S. 406 (1939)	
Haines v. Kerner, 404 U.S. 519, 521 (1972)	4,9
Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 (1977)	7
Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977)	8
Procunier v. Martinez, 416 U.S. 396 (1974)	8
Procunier v. Navarette, 55 L. Ed. 2d 24 (1978)	4
Rizzo v. Goode, 423 U.S. 362 (1976)	7
Swann v. Charlotte-Mecklenburg Board of Education, 402, U.S. 1 (1971)	7,9
Statutes Involved:	
28 U.S.C. & 1392 (a)	2,10
42 U.S.C. & 1983	2

Page

Miscellaneous:

Federal Rules of Civil Procedure, Rule 8 4

Rules of the Supreme Court of the United States, Rule 19 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1978

NO.

JAMES E. HOLSHOUSER, JR., et al,

Petitioners,

v.

THOMAS BOLDING, et al,

Respondents.

QUESTIONS PRESENTED

The Petition misstates the nature and number of the legal issues sought to be reviewed. The Court of Appeals dealt with three issues, the same three raised by the Petitioners herein when they filed this brief with the Fourth Circuit. Those issues are as follows:

I. WHETHER THE COMPLAINT CONTAINS SUFFICIENT FACTUAL ALLEGATIONS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

II. WHETHER THE RELIEF SOUGHT IS WITHIN THE SCOPE OF A PROPER EXERCISE OF THE DISTRICT COURT'S JURISDICTION.

III. WHETHER THE WESTERN DISTRICT OF NORTH CAROLINA IS A PROPER VENUE FOR THIS CLASS ACTION.

STATUTES INVOLVED

This case involves 42 U.S.C. § 1983 and 28 U.S.C. § 1392 in addition to the constitutional provisions mentioned in the Petition.

STATEMENT OF THE CASE AND FACTS

Petitioner's statement of the case and facts is substantially correct although the final paragraph contains a resume of facts which are relevant neither to the issues for review nor the question of whether the Court should grant the petition.

ARGUMENT

Rule 19 of this Court's Rules provides that "review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". Subsection (b) of that same rule gives some indication of the types of reasons which the Court considers "special and important" enough to justify issuance of the extraordinary writ of

certiorari; and these reasons provide a clear set of standards against which a particular court of appeals decision may be measured. The instant case, when judged against these standards, does not appear at this stage to be of such significance as to justify discretionary review by this Court.

The decision of the Fourth Circuit Court of Appeals did not decide "an important question of federal law which has not been but should be, settled by this Court" (Rule 19). Although the Court of Appeals was constrained to remind the District Court of its duty and jurisdictional authority to protect the constitutional rights of inmates in state prison systems by whatever mode of relief the proof requires, the thing actually decided by the Fourth Circuit was that enough had been alleged in the Complaint to require some further inquiry into the actual facts. The decision involved no more than the application of well-settled rules of pleading to a complaint filed by a group of prisoners who allege their civil rights have been violated. This Court has considered many such cases since the adoption of the Rules of Civil Procedure in

1938 and has announced and reaffirmed on several occasions the test to be applied in passing on the sufficiency of the complaints: "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. "Conley v. Gibson, 355 U.S. 41,46 (1957). See also Cruz v. Beto, 405 U.S. 519, 521 (1972) and Haines v. Kerner, 404 U.S. 519, 521 (1972). This test is in accord with the letter of Rule 8 and the spirit of the rules of pleading have not prevented the district courts from dismissing prisoners' complaints where clearly meritless, nor have the courts of appeals or this Court refused to affirm such action where justified. See Estelle v. Gamble 429 U.S. 97 (1976) and Procunier v. Navarette, 55 L. Ed. 2d 24 (1978). In the instant case a competent panel of judges reviewed the Complaint, applied the test established by this Court, and found the pleading to be sufficient on all but one count. There being no departure from "the accepted and usual course of judicial proceedings" (Rule 19) in cases of this type, no special or important reason appears for reviewing

the decision of the Fourth Circuit Court of Appeals in this case. The courts below will continue to apply the well-settled rules of pleading on a case-by-case basis and this Court will not have departed from its practice of refusing to take cases merely to reaffirm settled law.

Not only does there appear to be no significant federal question raised in this case, the granting of the petition would involve the Court in interlocutory review of a question which might never be presented if the case were allowed to proceed on to a consideration of the merits. Just as it would be meaningless and inefficient for the Court, burdened as it is with a heavy caseload, to take this case for review merely to reaffirm settled law, the interest of judicial economy would be equally ill-served by the Court's departure from its normal practice of denying interlocutory review. The inadvisability of this course of action is discussed by Mr. Justice Stevens in his dissent in Estelle v. Gamble, supra, a case similar to this one. Justice Stevens goes on to say that even "if the Court thought that instead of a pleading question, the case presented an important

constitutional question . . ., allegations of this complaint do not provide the kind of factual basis the Court normally requires as a predicate for the adjudication of a novel and serious constitutional questions - not dealing with pleadings but with administration of the prison system in the State of North Carolina. As Justice Stevens says,"such questions cannot be dealt with without an adequate "factual basis", the sort of basis which can best be tested by a motion for summary judgment (as suggested by the Fourth Circuit) or a trial on the merits.

The only interest that will be served by the Court's review of this case will be the State's interest in delaying discovery and trial. While this delay continues, the overcrowded conditions in North Carolina prisons about which the Respondents complain, continue to worsen. In a prison system designed to hold approximately 10,000 inmates there are now over 14,000 incarcerated. This latter figure represents a dramatic increase of some 2,000 prisoners since the suit was filed a little over two years ago. The Court should not contribute to further worsening of the situation by

granting the Petition and undertaking interlocutory review of an insignificant and well-settled question of law.

The Petitioners seek to make this something more than a simple pleadings question by asserting that the broad injunctive relief sought in the Complaint is so violative of principles of federalism and judicial restraint as to be beyond the authority of the District Court to grant. They rely upon the recent decisions of Rizzo v. Goode, 423 U.S. 362 (1976) and Jones v. North Carolina Prisoner's Labor Union, 433 U.S. 119 (1977). Although the Respondents acknowledge that this Court in Rizzo cautioned against sweeping injunctions directed at state officials, it is their belief that the relief sought in this case would not be violative of the principles restated in Rizzo. As the Court of Appeals points out: "Rizzo does not preclude recourse to broad injunctions when a clear pattern of unconstitutional conduct has been established". [A.p.A-10]. In fact, the Court specifically reaffirmed in Rizzo the exercise of federal injunctive power in the case of Swann v. Charlotte-Mecklenburg Board of

Education 402 U.S. 1 (1971), where school board administrators and board members were found by their own conduct in the administration of the school system to have violated the rights of minority students. Moreover, the Rizzo decision did not overrule Procunier v. Martinez, 416 U.S. 396 (1974), where the Court held:

> "But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights."

416 U.S. at 405-06. This principle was reaffirmed in Bounds v. Smith, 430 U.S. 817 (1977), decided after Rizzo, where the Court was presented (by the State of North Carolina interestingly) with the same argument that the federal courts should not sit as "co-administrators of state prisoners" and that the District Court had "exceeded its powers" in doing so in that case.

The relief sought in this case is no broader than that sought and granted in the similar case of Newman v. Alabama, 559 F. 2d 283 (5th Cir. 1977), cert. den. 46

U.S. L. Week 3803 (July 3, 1978). As noted by the Fourth Circuit, it remains to be seen whether the Respondents can adduce in this case the proof which will require such relief. But the decisions of this Court clearly mandate broad injunctive relief where the constitutional violations are equally clear. See Swann v. Charlotte-Mecklenburg Board of Education, supra, Hague v. CIO, 307 U.S. 406 (1939); and Allee v. Medrano, 416 U.S. 802 (1974). Therefore, it appears that a determination as to the appropriateness of the relief granted in a particular case should, indeed must, await the development through proof of the "factual basis" referred to by Justice Stevens in his dissent in Estelle v. Gamble, supra. For it cannot be said at this juncture that the Respondents can prove no set of facts in support of their claims which would entitle them to the relief sought. See Haines v. Kerner and Conley v. Gibson, supra. It is clear then that the District Court has the power to effectuate by injunctive relief the changes in the North Carolina prison system sought by the Respondents, if the prisoners meet their burden and prove the constitutional violations

alleged. Just as it was inappropriate for the District Court to decide that it lacked the "judicial power" to grant the relief sought, it would be ill-advised for this Court to prematurely review, without an adequate factual basis, the question of whether broad equitable relief should or should not be granted in this case.

The question of venue brought forward in the Petition is meritless in the opinion of the Respondents. 28 U.S.C. & 1392 (a) quite clearly covers the fact situation presented here and leaves no room for dispute. Review of this issue would be pointless and a waste of the Court's time.

CONCLUSION

It is respectfully submitted that the Petitioners have wholly failed to sustain their burden of establishing that there are special and import reasons why the extraordinary writ should be granted. The ruling of the Court below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor has the Court of Appeals for the Fourth Circuit decided a federal question in a way

to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals correctly reversed the District Court and correctly applied well-settled law in so doing. There is no issue of significance to be reviewed by this Court.

Respectfully Submitted,

VAN WINKLE, BUCK, WALL, STARNES, HYDE & DAVIS, P.A.

By: Russell P. Brannon

Russell P. Brannon
Post Office Box 7376
Asheville, North Carolina 28807
Telephone: 704/258-2991

ALLEN H. WELLONS
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 1978, three copies of this Brief were served upon Jacob L. Safron, Special Deputy Attorney General, and James Peeler Smith, Assistant Attorney General, by mailing copies therof, postage prepaid, to the Office of the Attorney General of North Carolina, Post Office Box 629, Raleigh, North Carolina 27602.

ALLEN H. WELLONS
Attorney for Respondents